2010 CarswellOnt 6817, 2010 ONSC 4835

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Wong v. Wires Jolley LLP

PETER WONG, ESTATE TRUSTEE OF THE ESTATE OF TUNG JEAN and PETER WONG (Applicants) and WIRES JOLLEY LLP (Respondent)

Ontario Superior Court of Justice

A.D. Grace J.

Heard: June 11, 2010
Judgment: September 7, 2010
Docket: CV-10-396534

Counsel: Glenn A. Hainey, Christopher Stanek for Applicants

Paul Michell, James Renihan for Respondent

Subject: Estates and Trusts; Public; Civil Practice and Procedure

Estates and trusts.

Alternative dispute resolution.

***A.D. Grace J.*:**

1 The administration of the estate of Tung Jean was complex and, for many years, hotly contested. Net proceeds of $20,546,298.49 were generated after the settlement of protracted, worldwide litigation.

2 Lawyer David Wires and his firm Wires Jolley LLP ("Wires Jolley") acted for the estate and its sole beneficiary Peter Wong[FN1]. The issue is whether Wires Jolley should be paid a contingency fee of $2,054,629.85 as ordered by the Honourable Fred Kaufman, Q.C., who acted as arbitrator. [FN2]

3 Some brief factual and procedural history provides important context for the issues ad-

dressed by counsel during their submissions.

I How Did the Dispute Arise?

4 Tung Jean passed away in 1999. Her husband, S.T. Wong, died a short time later.

5 Peter Wong was Tung Jean's sole surviving child. S.T. Wong had been married before. Nine children were born during his first marriage. Bitterness among the children of the blended family quickly ensued.

6 Ms Jean's assets were extensive and far flung. They were located in Canada, Hong Kong, Singapore and Japan. Her holdings included several pieces of real estate, bank accounts, shares in companies; even a transferable golf course membership.

7 The administration of the estates of Tung Jean and her husband precipitated lawsuits in several jurisdictions.

8 Mr. Wires was retained at an early stage. Until 2007, he played a significant role in the administration of the estate of Tung Jean, acted in respect of Ontario based litigation and oversaw ongoing legal proceedings in other parts of the world.

9 Wires Jolley rendered accounts regularly but was paid sporadically. With the estate embroiled in litigation, converting the estate into cash and then distributing the proceeds was delayed.

10 The provision of services by Wires Jolley was uninterrupted despite arrears in payments. The magnitude of the mounting, unpaid legal accounts became an increasing source of friction.[FN3] In 2004, the parties began to discuss an alternative fee arrangement. Instead of fees being charged based on hours spent, legal fees would be tied to the value of assets of the estate.

11 No agreement had been reached by the time the various factions of the Tung Jean family assembled in Hong Kong to try to obtain a mediated resolution of their dispute.

12 The Tung Jean family reached an accord on September 19, 2004. For the purposes of this application, the settlement included two significant features:

(a) Wires Jolley was to receive $400,000 in trust; and

(b) the solicitors for the estate of Tung Jean could seek probate, without challenge, in the various jurisdictions in which assets were held.

13 Approximately a year later, Wires Jolley sought and obtained a consent order of Kiteley J. of this Court. The September 27, 2005 order approved various accounts of Wires Jolley and

the predecessor law firm and directed that most of the funds held by Wires Jolley in trust ($372,547.27 of $400,000) be paid on account. Wires Jolley was directed to pay the balance to Peter Wong.

14 As the motion materials presented to Kiteley J. were being prepared, Wires Jolley and Mr. Wong were quietly finalizing a new fee arrangement going forward. Walter Mis, an Alberta based lawyer, assisted Mr. Wong in this endeavour.

15 The new arrangement was not outlined in a single document. Its terms are to be drawn from a proposal of Wires Jolley[FN4] and subsequent communications.[FN5] While the parties seemed to agree the fee was to be equal to ten per cent of the net value of the estate's assets, the valuation date is the subject of disagreement.

16 Wires Jolley maintained the relevant date was when the assets were converted into cash. That approach resulted in its claim to more than $2 million. Mr. Wong argued the values were fixed when Ms Jean died. Mr. Wong says those figures were set forth in a calculation prepared by Wires Jolley for a September 16, 2005 meeting.[FN6] According to that calculation, the fee would have been $461,115.

17 Matters reached a head in July, 2007. Mr. Wong and Mr. Wires met over dinner. It went badly. No further work was performed by Wires Jolley. Within days the firm rendered an account for $2,054,629.80 representing ten per cent of the market value of the estate's assets as at that date and not the market value as at the date of Ms Jean's passing.[FN7]

18 Shortly after, Wires Jolley served Mr. Wong with a notice of arbitration.[FN8] No further work was performed by Wires Jolley after July, 2007.

II How Did the Matter Get Here?

19 Mr. Wong disputed the notice of arbitration. Mr. Wong took the position a disagreement over a solicitor's account had to be resolved by the court as contemplated by the *Solicitors Act*, R.S.O. 1990, c. S.15. He argued that parties were not free to vary the statutory procedure by agreement. The argument initially found favour,[FN9] However, the Court of Appeal disagreed. It held the parties could select a different decision maker so long as the assessment was made in accordance with the substantive statutory rights contained in the *Solicitors Act.*[FN10]

20 The Honourable Mr. Kaufman had already been appointed arbitrator by the ADR Chambers but the arbitration process was suspended pending the outcome of the jurisdictional issue. With the Court of Appeal decision in hand, the process continued.

21 On November 13, 2009 the Arbitrator released his decision.[FN11] The Arbitrator concluded Wires Jolley and Mr. Wong were not of one mind on the valuation issue. The Arbitrator wrote:

> "In the final analysis, even though both parties (as well as the Court of Appeal) seemed to agree that a success fee arrangement existed, I am not certain that [Wires Jolley] and [Peter Wong] had the same view of the contents, as demonstrated by subsequent discussion, either directly or through the medium of Mr. Mis. I will therefore decide the dispute on a *quantum meruit* basis. The result, I might say, will be the same since what I decide, by whatever method, must be fair and reasonable." (para. 36) (Portions in square brackets added)

22 The Arbitrator concluded the compensation sought by Wires Jolley was fair and reasonable. It received an award for the amount it claimed on account of a success fee, less partial payments already received.

23 On January 28, 2010 the Arbitrator awarded costs to Wires Jolley on a partial indemnity basis in the amount of $129,643.41 inclusive of disbursements.[FN12]

24 Dissatisfied with the awards, Mr. Wong wished to appeal. The parties had failed to address that issue in their patchwork fee agreement.

25 Absent agreement, the *Arbitration Act, 1991*, S.O. 1991, c. 17, gives an unsuccessful party a narrow avenue of appeal. Section 45 (1) provides:

> If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> > (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
> >
> > (b) determination of the question of law at issue will significantly affect the rights of the parties.

26 The "court" referred to in that section is the Superior Court of Justice: *Arbitration Act, 1991*, *supra*, s. 1.

27 Mr. Wong's lawyers believed they had a wider right of appeal to another court. Since the arbitrator's decision related to the provisions of the *Solicitors Act*, *supra*, they were of the view the right of appeal arose under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6 (b) and followed its path. On December 1, 2009, they appealed to the Court of Appeal.

28 Wires Jolley was then represented by Mr. Marin. He reacted immediately. In a December 3, 2009 letter Mr. Marin questioned Mr. Wong's right to appeal at all. Mr. Marin's first words were "Your clients' appeal to the Court of Appeal is misconceived".

29 The point was not conceded and so Wires Jolley moved to quash the appeal. A panel of the Court of Appeal granted the motion on January 25, 2010. The short handwritten endorsement read:

> The award under appeal was made by an arbitrator, not by a Superior Court judge. Accordingly this court has no jurisdiction to hear the appeal. The appeal is quashed but without prejudice to the right of the responding parties to seek a remedy elsewhere. The moving parties (sic) are entitled to their costs, fixed at $3500 all inclusive.

30 On February 5, 2010, notice of this application was issued seeking leave to appeal "if required" and an order setting aside the Arbitrator's award.[FN13]

31 The following issues arise[FN14]:

(1) Has Mr. Wong contracted out of any right of appeal?

(2) Is Mr. Wong's appeal timely;

(3) If not, can and should there be an extension of time?

(4) If the appeal proceeds, should leave to appeal be granted?

(5) If leave is granted, should the Arbitrator's award be set aside?

III Has Mr. Wong Contracted Out of Any Right of Appeal?

32 Section 3 of the *Arbitration Act, 1991*, *supra*, allows parties to exclude almost all of its provisions "expressly or by implication". No particular form of agreement is required. In appropriate circumstances, an agreement to adhere to institutional rules will suffice: Sutton, Gill & Gearing, *Russell on Arbitration* (Sweet & Maxwell, 23rd ed., 2007) at 65-66.

33 While parties cannot contract out of their right to set aside an award based on the grounds set forth in section 46,[FN15] Mr. Wong does not rely on that provision. Mr. Wong could, therefore, contract out of any right of appeal from the decision of the Arbitrator. Did he?

34 On September 12, 2007 Mr. Wires sent a copy of the notice of arbitration to the ADR Chambers and asked for "a list of eligible arbitrators for an international commercial arbitration."

35 On September 20, 2007 the Coordinator of the ADR Chambers advised Mr. Wires and Mr. Wong that the arbitration would be conducted in accordance with the *ADR Chambers Arbitration Rules ("ADR Rules")* and provided them with the uniform resource locator.

36 Paragraph 12.5 of the *ADR Rules*[FN16] provided:

> An award or interim award made under the provisions of these Rules shall be treated as a final award...and shall not be subject to any appeal to the courts or otherwise *unless the Parties have otherwise agreed.*(My italics)

37 The *ADR Rules*[FN17] further provided:

> These Rules shall, subject to such modification as the Parties may agree upon, be deemed to have been made a part of any Arbitration Agreement which provides for arbitration to be administered by ADR Chambers, under these Rules or under the rules of ADR Chambers, or any similar expression.

38 On July 23, 2009, the Response to the Notice of Arbitration of Mr. Wong and the Jean Estate was served. Paragraph 63 says:

> The Respondents agree that this arbitration should be heard by Fred Kaufman, Q.C. at ADR Chambers.

39 While the response did not mention the *ADR Rules*, their existence was not a mystery. They were specifically mentioned by ADR Chambers in the early stages of the process. Experienced and capable counsel for Mr. Wong expressly agreed to arbitration at ADR Chambers by the arbitrator ADR Chambers had assigned. I am of the view that the parties agreed to be bound by the terms of the *ADR Rules.* While they were free to vary them, they did not. Regrettably, I am of the view, that the Jean Estate and Mr. Wong have no right of appeal under section 45 of the *Arbitration Act, 1991.*

40 Does the fact the parties' dispute revolves around a fee arrangement between a firm of solicitors and its clients change the approach? Mr. Hainey maintains it does. He submits that by declining to hear an appeal relating to a solicitor's account the Court is abdicating its responsibility to supervise and regulate contingency fee arrangements. In *McIntyre Estate v. Ontario (Attorney General)*,[FN18] O'Connor J.A. said:

> It is critical that contingency fee agreements be regulated and that the amount of fees be properly controlled. Courts should be concerned that excessive fee arrangements may encourage the types of abuses that historically underlay the common law prohibition against contingency fee agreements and that they can create the unfortunate public perception that litigation is being conducted more for the benefit of the lawyers than for the clients. Fairness to clients must always be a paramount consideration.

41 In this case, the decision maker chosen by the parties did review the "success fee agreement" (the phrase preferred by Wires Jolley) or "contingency fee agreement" (the phrase preferred by the Jean Estate and Mr. Wong) as contemplated by the *Solicitors Act.*

42 Is it essential that the court become involved whenever a client is dissatisfied with the result? In my view, no. Full rights of appeal could easily have been preserved by the parties. The *Arbitration Act, 1991* allows the parties to establish the parameters of an appeal. The arbitration agreement can give rights to appeal on a question of fact (s. 45 (3)), a question of law (s. 45 (1)) or a mixed question of fact and law (s. 45 (3)). As already stated subject to limited exceptions, the parties can agree to exclude the right of appeal entirely (ss. 3 and 46).

43 The *ADR Rules* expressly gave the parties wide latitude. Many of their provisions, including those relating to appeals, could have been modified by agreement. The parties did not exercise those rights. Should the court now confer a right of appeal on one party against the wishes of the other because the issue relates to a solicitor's bill? In my view the answer is no. Mr. Wong is sophisticated. Throughout he has been assisted by counsel. He received what he bargained for. The public interest was served. The fee arrangement was reviewed by an objective decision maker agreed to by the applicants.

44 While that finding is fatal to the application, I will address the other issues raised in case others disagree with my conclusion.

IV Is the Appeal Timely?

45 The *Arbitration Act, 1991* requires that an appeal be commenced within 30 days after "the appellant...receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based": section 47 (1).

46 When did time start to run? In my view, the 30 day period started on November 13, 2009 when the parties received the arbitrator's reasons.[FN19] Aside from costs, nothing else was left to be decided. Although the arbitrator's ruling on costs and formal award were not issued until January 28, 2010, the time to appeal had already expired.[FN20] As Borins J.A. wrote:[FN21]

> ...litigants are best served by a rule which accords with the traditional understanding that a decision on the merits is final for the purpose of appeal when it is rendered, notwithstanding the pendency of the determination of the costs attributable to the case.

47 Timeliness would not have been an issue had the Court of Appeal been the proper court. However, it was not. The appeal was quashed. While I would have thought there was jurisdiction to do so, the appeal was not transferred or adjourned to the Superior Court of Justice: *Courts of Justice Act, supra*, s. 110.

48 Absent authority, I am reluctantly unable to conclude that the 30 day period ceased to run when an appeal to the wrong forum started. I unhappily conclude this appeal is not timely.

V Can and Should There Be an Extension of Time?

49 If left to my own devices, I would extend the time. The Jean Estate and Mr. Wong clearly had the intention to appeal very soon after the Arbitrator's decision was released. They complied with the *Rules of Civil Procedure* which they thought was applicable.

50 This application was issued soon after the appeal was quashed. An extension of time would cause no discernible prejudice to Wires Jolley.

51 Mr. Hainey submits that leave can be granted. He relies on the following statement of Feldman J.A. in *Brent v. Brent*[FN22]:

> The test for granting an extension of time is set out *Frey v. MacDonald*...the appellant must have maintained a firm intention to appeal from the beginning, the failure to observe the time limits must be reasonably explained, subject to a broader rule that leave will be granted if the justice of the case requires it, including the merits of the proposed appeal and the prejudice to the respondent.

52 On first reading *Brent v. Brent* seems to involve an appeal from an Arbitrator's decision.[FN23] However, on a closer review the issue becomes clear. Weekes J. had quashed an appeal from an arbitrator's decision. The appellant sought to appeal that decision under the *Rules of Civil Procedure.* When the time limit set forth in the *Rules of Civil Procedure* expired, the appellant sought an extension. A broad power to extend time is set forth in the *Rules of Civil Procedure*: rule 3.02.

53 Section 47 of the *Arbitrations Act, 1991* imposes a time limit but says nothing about an extension of time. Is that significant? I believe it is.

54 Section 39 of that statute reads:

> The court may extend the time within which the arbitral tribunal is required to *make an award*, even if the time has expired.(My italics)

55 In my view, I do not have the authority under the *Arbitration Act* to extend the time to appeal because:

(i) the statute has created its own time frame within which an appeal is to be commenced. The time limits set forth in the *Rules of Civil Procedure* do not apply;

(ii) since jurisdiction to extend time in one situation is expressly given in section 39, I am of the view the power to extend a time limit in the *Arbitration Act, 1991*, does not exist unless it is specifically conferred;

(iii) section 47 of the *Arbitration Act, 1991* contains no such statement.

56 Is there inherent jurisdiction to extend the 30 day period? Not in this case. Inherent jurisdiction is not limitless. As Morawetz J. wrote in *Scion Capital LLC v. Goldfields* (2006), 15 B.L.R. (4th) 331 (S.C.J.), at para. 34:

> Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, permitting the court to maintain its authority and to prevent its process being obstructed and abused. In *Stelco Inc., Re*, the Court of Appeal, at para. 35, states: In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in *Royal Oak Mines*, *supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play." [Citations omitted.]

57 For the reason already given I am not of the view the legislature has left a "functional gap or vacuum". The legislature has given the court jurisdiction to extend time in one instance in proceedings to which the *Arbitration Act, 1991* applies. This is not that situation.

58 As Juriansz J.A. said in *Danso-Coffee v, Ontario*, 2010 ONCA 171 at para. 61:

> Time limits and limitation periods serve a valuable function in the legal process by promoting finality. The fact that time limits and limitation periods are to the detriment of parties who miss them does not affect the equities, in my view.

VI Should Leave to Appeal Be Granted?

59 Even if Mr. Wong succeeded, should leave to appeal be granted?

60 Leave to appeal can only be granted if three preconditions are met:

a) the issue raised is a question of law;

b) the matters at stake in the arbitration are sufficiently important to the parties that an appeal is justified; and

c) the determination of the issue raised will significantly impact the rights of the parties.

61 Eight paragraphs and various subparagraphs in the notice of application are devoted to the Arbitrator's alleged errors in law. They can be condensed. In essence, Mr. Wong maintains the Arbitrator erred:

a) by saying the regulations outlining the specific requirements which contingency fee agreements must meet[FN24] had not been proclaimed by September, 2005. The parties' agree the arbitrator was mistaken. The regulations came into force October 1, 2004;[FN25]

b) by failing to apply section 28.1 of the *Solicitors Act*, *supra* and the regulation relating to contingency fee agreements; and

c) by awarding an amount which was determined as if there was a valid contingency agreement in place containing the terms advocated by Wires Jolley rather than an amount determined by application of the factors used to determine a fee which is fair and reasonable.

62 Do any of those raise a question of law? Questions of law are questions about what the correct legal test is.[FN26] The question as to whether section 28.1 of the *Solicitors Act* applied to the parties' fee arrangement is, in my view, one of law. Despite the importance to the parties of the matters at stake in the arbitration, Mr. Wong cannot satisfy the third precondition outlined above. Section 28.1 of the *Solicitors Act* and the related regulation do not "significantly affect the rights of the parties". Their provisions had no practical impact on the arbitrator's decision because he concluded, as Mr. Wong advocated, that the fee arrangement was not a valid contingency arrangement.

63 In determining a "fair and reasonable" fee, the arbitrator turned to *quantum meruit*. The applicants complain that the Arbitrator was wrong in withdrawing that equitable remedy from the toolbox. Indeed paragraph 54 of the applicants' factum says:

After determining that there was no agreement as to the terms of the contingency fee agreement, the Arbitrator quite properly stated that he was required to apply the doctrine of *quantum meruit* to the question of the success fee. However, instead of properly applying the doctrine...the Arbitrator merely applied a percentage of 10% to the 2007 value of the assets of the Tung Jean Estate, the very calculation Wires claimed applied.

64 The complaint is that the Arbitrator fashioned the remedy inadequately: the arbitrator paid lip service to some but not all of the relevant factors when, in reality, he chose to ignore the factors and enforce the fee arrangement advocated by Wires Jolley.

65 Unquestionably at first sight the fact the amounts equate seems more than coincidental. However, closer scrutiny provides an explanation. Although the portion of the reasons dealing with the issue of fair and reasonable compensation is not lengthy, the reasons of the Arbitrator clearly outline his thought process. By way of example, at paragraph 37 he wrote:

...the quality of services rendered by Mr. Wires are (sic) not in question. He is very experienced counsel who worked very hard on behalf of his clients. The obstacles he faced were formidable, but with skill and perseverance he succeed (sic) to his clients' entire satisfaction. Indeed, the ultimate result may well have exceeded Mr. Wong's fondest expectations.

66 In other paragraphs the arbitrator referred to the complexity and enormity of the worldwide litigation Mr. Wires was overseeing, the fact Mr. Wires expended "substantial" time "involving a great deal of travel, and innumerable conversations...with counsel in many jurisdic-

tions"[FN27] While he found that the dramatic increase in the estate's value "came about largely through the passing of time and not because of Mr. Wires' efforts"[FN28] he was of the view Mr. Wires was instrumental in achieving a settlement which allowed Mr. Wong to enjoy the fruits of escalating market value.

67 In concluding that Wires Jolley was entitled to a substantial premium, the Arbitrator said:

> "There is no formula by which to calculate a premium. *Each case will stand or fall on its particular facts.* And in this case they show that Mr. Wires, by his knowledge, skill, perseverance and great devotion to his client, brought about an excellent result. True, as I said before, the large accretion of value was incidental, but this would not have come about had the winding up of the estate, with its world-wide implications, not been overseen, directed and managed with great astuteness."[FN29] [My italics]

68 These passages and references support the conclusion that in determining the appropriate fee, questions of mixed fact and law were engaged. As Iacobucci J. said:

> "In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact."[FN30]

69 The applicants' submissions with respect to the Arbitrator's approach to *quantum meruit* do not involve a question of law. In any event, the arbitrator did consider the relevant factors.[FN31] A reading of the reasons in their entirety evidence the fact the Arbitrator considered the time and effort required and spent, legal complexity, the degree of responsibility assumed, the monetary value of the matters at issue, the importance of the matters to the clients, the degree of skill and competence demonstrated by Mr. Wires, the results achieved, the ability of the client to pay and to the extent he could, the clients' expectations as to the amount of the fee. While my determination of what was appropriate may not have accorded with the Arbitrator's, I am not in a position to say it was unreasonable

70 I do not believe that the preconditions to the granting of leave to appeal have been satisfied.

71 I reiterate that while the parties could have agreed to an appeal on a question of fact or a mixed question of fact and law,[FN32] they did not do so.

VI Conclusion

72 For the reasons given the application is dismissed.

73 Absent agreement short written submissions on costs not exceeding four pages (exclusive of a costs outline) may be provided to me through Judges' Administration by, in the case of

Wires Jolley, September 24, 2010 and in the case of Mr. Wong, October 8, 2010. I appreciated the assistance of counsel.

FN1 Originally McCague Peacock Borlack McInnis & Lloyd acted for the estate and Mr. Wong. David Wires was the lawyer performing the work. He left that firm in 2002 and took the file with him.

FN2 After deducting payments made to Wires Jolley LLP on account, the arbitrator ordered the applicants to pay the principal sum of $1,427,107.68, pre-award interest from July 20, 2007 of $144,494.65, the sum of $129,643.41 on account of costs and post-award interest.

FN3 It appears that the problem first arose in the summer of 2001.

FN4 Wires Jolley set forth two options in a September 12, 2005 letter.

FN5 Mr. Wong responded on September 16, 2005. There were subsequent communications on September 21, 22 and 23. In a September 23, 2005 e-mail Mr. Mis advised Mr. Wires: "Your emails to Peter and his responses will now constitute the revised contingency success fee agreement..."

FN6 Copies appear at tab 3 of the applicants' compendium. It is not clear from the calculation where the values were drawn. Counsel for Mr. Wong takes the position they were based on estimated values as at the date Ms Jean died in 1999.

FN7 By this time Mr. Wong had paid $118,425 on account of the success fee. That payment was made in December, 2005.

FN8 The September 12, 2005 letter from Wires Jolley to Mr. Wong had proposed that "Disputes arising from or in relation to the success fee will be resolved by arbitration in Toronto with a single arbitrator from ADR Chambers."

FN9 *Jean Estate v. Wires Jolley LLP* (2008), 90 O.R. (3d) 231 (S.C.J.)

FN10 *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339(at para. 84)

FN11 The Decision and Reasons are dated November 2, 2009 but the parties agree the release date was much later.

FN12 The Ruling on Costs is dated January 12, 2010. Once again, the parties agree it was not delivered for some time.

FN13 The formal award embodying the Decision and Reasons dated November 2, 2009 and the Ruling on Costs dated January 12, 2010, also bears the date of January 12, 2010.

FN14 Until the application was argued it was not clear to what extent the applicants' argument was based on the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9. During argument, it became clear that the applicants' relied on the *Arbitration Act, 1991* and not the *International Commercial Arbitration Act.* For that reason, I have not mentioned the latter statute in the body of my endorsement.

FN15 The grounds are set forth in section 46 (1) 1 through 10 and include the invalidity of the arbitration agreement, procedural unfairness and reasonable apprehension of bias.

FN16 The reference is to the *ADR Rules* effective September 7, 2007. Paragraph 13.5 of the *ADR Rules* effective January 1, 2009 is identically worded.

FN17 *ADR Rules*, section 2.1.

FN18 (2002), 61 O.R. (3d) 257 (C.A.) at 283

FN19 *Walmsley v. Griffith* (1886), 13 S.C.R. 434

FN20 *Ibid.*

FN21 *Byers (Litigation Guardian) v. Pentex Print Master Industries Inc.* (2003), 62 O.R. (3d) 647 (C.A.) at para. 17

FN22 [2004] O.J. No. 637 (C.A.) at para. 10

FN23 The appellants rely on *Demers v. Desrochers*, [2009] O.J. No. 3294 (S.C.J.). The court held the 30 day time period set forth in section 47 of the *Arbitration Act, 1991*, had not started to run because the parties had contractually agreed to defer its commencement until the arbitrator's decision on costs had been delivered. In *obiter*, the court indicated it would have extended the time even if it had expired on the authority of *Brent v. Brent, supra.*

FN24 O'Reg. 195/04

FN25 Ontario Gazette, Vol. 137-27 dated July 3, 2004.

FN26 *Director of Investigation and Research v. Southam Inc. et al.* (1998) 144 D.L.R. (4th) 1 (S.C.C.) at para. 35

FN27 At paragraph 39

FN28 At paragraph 35

FN29 At paragraph 41

FN30 *Southam*, *supra*, at para. 37

FN31 *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.)

FN32 *Arbitration Act*, *supra*, s. 45(3)

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