FAMLNWS 2022-02
Family Law Newsletters
January 17, 2022

— Franks & Zalev - This Week in Family Law

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Can You Refer to an Agreement to Prove an Agreement?

Association de médiation familiale du Québec v. Bouvier, 2021 CarswellQue 18848 (S.C.C.)

As we discussed in the August 17, 2020 edition of *TWFL*, this family law case dealt with mediation/settlement privilege and exceptions to mediation privilege. The Supreme Court released its decision shortly before the holidays, and the majority confirmed that communications made during family law mediation sessions ***can*** be used to prove the existence of a settlement agreement. While we would have been surprised had the result been different, as noted below, the concurring opinions of Justices Abella, Karakatsanis and Martin offer a bit of a different spin.

This was a family law case from Quebec. After separation, the common law spouses participated in several family mediation sessions. At the end of that process, the mediator prepared a document known (in Quebec) as a "summary of mediated agreements" that explained how the parties had agreed to settle their disputes.

Some years after the mediation ended, Ms. Bisaillon filed a claim in the Quebec Superior Court and asked for more than what was set out in the summary. Mr. Bouvier took the position that the parties had reached an agreement in mediation, and he filed the summary as part of his case. Ms. Bisaillon denied the parties had reached an agreement and objected to the summary being admitted in evidence, arguing that, as part of the mediation, the summary was protected by mediation/settlement privilege that was a rule of absolute confidentiality.

The Superior Court rejected Ms. Bisaillon's argument. In doing so, the Court relied on *Bombardier inc. c. Union Carbide Canada inc.*, 2014 CarswellQue 3600 (S.C.C.) — a commercial mediation case. In *Union Carbide*, the Supreme Court recognized that there is a "settlement exception" to the confidentiality of the mediation process that makes evidence about what happened during a mediation admissible for the purpose of proving whether a settlement was actually reached.

Based on the summary (and the parties' post-mediation conduct), the Quebec Superior Court found Ms. Bisaillon and Mr. Bouvier had settled their matter in mediation. Ms. Bisaillon appealed to Quebec's Court of Appeal, which dismissed the appeal. However, in concurring reasons, Justice Doyon wrote that the settlement exception recognized in *Union Carbide* does ***not*** apply to family mediation cases unless it is clearly shown that this was what the parties wished. (However, Justice Doyon also found that the post mediation conduct of the parties evidenced an agreement.)

While Ms. Bisaillon decided not to appeal the Court of Appeal decision, Quebec's Association de Médiation Familiale, an intervener, was permitted to take the case to the Supreme Court.

As noted above, the majority sided with Mr. Bouvier, and found that the settlement exception to mediation privilege also applies to family mediation cases. While acknowledging that, "negotiations following the breakdown of a relationship often take place during a period of personal upheaval that may heighten the vulnerability of either spouse," the majority also noted that the mediation process itself included other safeguards to assure the protection of vulnerable parties such that a rule of absolute confidentiality was not required. As noted by Justice Kasirer, who wrote for the majority, to reject the settlement exception in favour of absolute confidentiality would interfere with the primary objective of family mediation — to reach an agreement.

As a result, where one party denies an alleged settlement reached in mediation, the settlement exception will allow disclosure of the communications that are necessary to establish the existence or terms of the agreement (but no more than necessary to prove the agreement).

Again, this was an expected result, as it would be inimical to the family mediation process to prevent a party from using the fact of an agreement to prove its very existence.

Justices Abella, Karakatsanis and Martin concurred in the result and agreed that the appeal should be dismissed. However, they did not agree that the settlement exception from *Union Carbide* should apply to communications in family mediation — although they do try to clearly limit their comments specifically to Quebec. In their view, discussions within family mediation should remain strictly confidential unless the parties specifically agree otherwise. Rules relating to the exceptions to the confidentiality of settlement negotiations in civil and commercial cases cannot simply be transposed into the family law arena. To do so would undermine the unique legal approach to family law settlements developed by the courts and the broader objectives of the family mediation regime. They were of the view that the summary was protected by settlement privilege and was inadmissible.

In the view of the concurring justices, family breakdown is "no ordinary legal issue" — the dissolution of a family relationship can be a catastrophic event full of emotional turmoil and vulnerability. And this creates broader objectives for family mediation beyond just promoting settlement, such as setting the groundwork for restructuring relationships and protecting vulnerable parties to achieve equitable outcomes. The effectiveness of family mediation in promoting settlements is predicated on the creation of a confidential space where the parties can fully discuss and explore the issues. Confidentiality is required for full and frank discourse and to leave the parties in a position to move forward into the future.

Again, these comments seem to be specific to Quebec where the family mediation regime actually *prohibits* lawyers from being present with the certified mediator and the parties.

Given the peculiarities in the Quebec mediation system, we understand where the concurring opinion is coming from. All mediators are not created equal, and given the *requirement* that counsel not be present, it is certainly possible that a party might bind themselves to a deal that is unfair during a mediation session.

But for the rest of Canada, the reasons of the majority are preferred. To suggest that a party cannot provide evidence of an agreement reached in mediation to prove an agreement reached in mediation is a recipe for family law disaster, where it is not uncommon for parties to have "sober second thoughts." That being said, and as we noted in our prior comments about this case in the August 17, 2020 (2020-32) edition of *TWFL*, you can avoid this type of dispute entirely by ensuring that when engaging in settlement discussions (whether by correspondence, mediation, or direct negotiations), you make it clear at the outset that a written agreement signed by both parties is a true condition precedent to a binding settlement.

How Not to Qualify an Expert

Aldush v. Alani, 2021 CarswellOnt 13588 (S.C.J.) — Smith J.

In 2000, the late Justice Marvin Catzman published a very funny article in the Advocates' Society Journal called "The wrong stuff: How to lose appeals in the Court of Appeal." It was a fantastically readable and educational article. In the article — which is available online on the Supreme Court Advocacy Institute's website (https://www.scai-ipcs.ca/pdf/Catzman-

TheWrongStuff.pdf) — and in several follow up articles, Justice Catzman provided a list of "helpful" tips on how to *lose* an appeal. We recommend it to you.

The conduct of the father's expert in *Aldush v. Alani* offers the opportunity for a similar list of tips — this time about how to *lose* a motion to qualify an expert. More on this at the end.

The parties were married in 1999 and had three children together. During the marriage, the family lived in the United Arab Emirates (the "UAE").

In 2018, the mother left the UAE with the children and came to Canada to escape violence and abuse she alleged the father had committed against her.

When the mother arrived in Canada, she made a claim for refugee protection that was ultimately granted. She then started an Application in Ontario for, among other things, sole decision-making for the children. The father responded by bringing a motion in Ontario to have the children returned to the UAE. The father also started a proceeding in the UAE for custody of the children.

The UAE ultimately determined that only one of the parties' three children should be returned to the father, while the other two children should be allowed to stay with the mother in Canada. Accordingly, the only issue that remained for the court in Ontario to decide was whether the third child should be returned to the UAE.

Both parties retained experts to provide evidence about the law of the UAE. As Justice Smith noted in his decision, the two-stage test for determining whether an expert report is admissible is as follows:

> [23] **The test for the admissibility of expert evidence is a two-stage approach. The first stage deals with the threshold requirements of admissibility**: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert. **The second stage pertains to the judge's gatekeeper role, in determining that the benefits of admitting evidence outweighs its potential risks**, considering these factors: (1) legal relevance; (2) necessity; (3) reliability, and (4) absence of bias: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 23 and 24. [emphasis added]

Justice Smith had no difficulty determining that both parties' proposed experts met the first three requirements of the first stage of the test (threshold admissibility). The proposed evidence was *relevant*, it was *necessary* in order to assist the court in Ontario to understand Sharia Law and Islamic Legal Systems, and it was not subject to any *exclusionary rules*.

Thus the focus of the *voir dire* was on the fourth requirement of the first stage — whether one or both of the proposed experts were properly qualified. Justice Smith started by summarizing the applicable legal principles:

> [24] **A properly qualified expert must be able to provide fair, objective and non-partisan assistance to the Court.** The expert's opinion must be impartial, independent, and absent of any bias. In terms of independence, the expert's opinion must be the product of independent and uninfluenced judgment: *White Burgess Langille Inman*, 2015 SCC 23 at paras. 2 and 32.
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> [25] To be found as a properly qualified expert, **the Court must be satisfied that the expert has "acquired special or particular knowledge through study or experience in respect of the matters on which he or she undertakes to testify"**: *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 27.
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> [26] **The words "properly qualified" does not only mean "judicially qualified" but also refers to academic and experiential credentials, as well as registration with a governing body regarding the expertise**: *Children's Aid Society of Algoma v. F.M.*, 2021 ONCJ 186 at para. 14.
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> [27] Factors that can assist the Court in determining if the tendered witness is qualified includes the expert's formal education, professional qualifications, membership and participation in professional associations, attendance at courses or seminars in the subject matter, experience, teaching and writing in the proposed area, and previous qualification to give opinion evidence: *R. v. Pham*, 2013 ONSC 4903 at para. 31.

> [28] **An independent analysis is required for an expert's opinion. Adopting another expert's opinion is not acceptable** because the opinion cannot be assessed by the opposing party or by the trier of fact: *West Moberly First Nations v. British Columbia*, 2018 BCSC 730. [emphasis added]

Justice Smith was satisfied that the mother's proffered expert was properly qualified given that:

- He had a lengthy academic and legal career that focused on Sharia Law and the Islamic Legal System;
- He was an adjunct professor at Carleton University and taught a course on Human Rights, Sharia Law and the Islamic Legal System;
- He had lectured and published articles about Sharia Law;
- He had previously been qualified to give expert opinion evidence about Sharia Law in Ontario; and
- He gave his evidence in a direct and precise manner and did not waiver under cross-examination.

Furthermore, even though the mother's expert's experience primarily related to the legal system in Iran, and he was not licenced to practice law in the UAE, Justice Smith was satisfied that this was something that should go to the weight that should be given to his evidence as opposed to whether he was qualified to give expert evidence.

The same could not be said for the father's expert, who did not even come close to having the necessary qualifications to give expert evidence at trial, and whose evidence was ultimately held to be inadmissible.

Although the father's expert was licenced to practice law in the UAE, he had only been practicing for four years. He was a general practitioner and did not specialize in family law. He had not taught any courses or published any articles about Sharia law.

Furthermore, when the father's expert testified during the *voir dire*, his evidence was "overly broad, vague, and lacked specifics", and contained many inconsistencies. When he was challenged in cross-examination, he often "became defensive, impatient, evasive and at times, refused to answer the questions posed to him."

And then, even if the father's expert had been properly qualified, Justice Smith would still have excluded his evidence as part of his gatekeeping role at the second stage of the test. His Honour was not satisfied that the father's expert had even written the report in question, and ultimately found that the father's expert had simply adopted someone else's report — and then lied by claiming that he wrote it himself. As Justice Choi noted in *West Moberly First Nations v. British Columbia*, 2018 CarswellBC 1066 (B.C. S.C.), an expert cannot just adopt another expert's report:

> [184] In my opinion, the thrust of the case law supports the proposition that while an expert may rely on other experts' reports for limited purposes (for example, to situate their own opinion within a body of specialized knowledge or to refer to commonly accepted treaties/practices), another expert's report cannot be tendered for the truth of its content. An expert's opinion must be the result of independent analysis. Another expert's opinion cannot simply be adopted. This practice does not allow the opposing party or the trier of fact to adequately assess the opinion.

Furthermore, the father's expert's evidence did not meet six of the seven basic minimum requirements for expert evidence in rule 20.2(2) of the *Family Law Rules*. In particular, although the father's expert had signed an acknowledgement of expert's duty as required by rule 20.2(2)(7):

- It did not include his name or provide sufficient details about the subject matter of his expertise as required by rule 20.2(2)(1);
- It did not provide sufficient information about his qualifications as required by rule 20.2(2)(2);

> • It did not set out the nature of the opinion being sought in relation to each issue to which the opinion related as required by rule 20.2(2)(3);
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> • It did not outline the instructions that had been provided to him as required by rule 20.2(4);
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> • It did not provide his opinion on each issue as required by rule 20.2(2)(5), and at best could be "described as a memorandum of law that purports to be a summary of the law in the UAE, subject to the caveat that his summary is incomplete" as it "omits any references to the reservations made by the UAE in relation to the Convention on the Elimination of All Forms of Discrimination Against Women", which provide that "where Sharia Law and the Convention conflict, the Sharia Law will prevail"; and
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> • It did not include a description of the factual assumptions he had relied on or set out the factual foundation for his opinion as required by rule 20.2(2)(6).

So if you, like the father in this case, want to lose a motion to qualify an expert, here are some "tips" that you can take away from this case:

> • Tip #1 — Don't check whether your expert actually has the necessary expertise to offer the desired expert opinion. Do not review their resume. Do not ask about prior occasions whereupon they have been qualified. In this area, surprises are best.
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> • Tip #2 — Don't waste time preparing your expert (or even better, don't speak to them at all), before they give evidence in court. All experts know how to testify; there's no point in telling them their business.
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> • Tip #3 — Have your expert save money by just adopting someone else's report. Or in a closely-related version of this tip, let the expert have someone else do the work and analysis and let them just sign the report.
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> • Tip #4 — Don't make sure that your expert's report meets the basic requirements of the rules applicable to experts in your jurisdiction. Any such "rules" are more like "guidelines."

When $130,000 in Damages Just Ain't Enough

LDS v. SCA, 2021 CarswellAlta 2576 (Q.B.) — Belzil J.

The parties were together from 2011 to 2014 and had a child together.

In 2015, the father hacked into the mother's Facebook and email accounts, and posted intimate photographs of the mother without her consent. He was criminally charged and pled guilty to the charge of mischief.

While some would, at this point, admit their mistake and move on, the father was undeterred. He continued to abuse the mother by posting very private pictures of her. In 2016, the mother discovered that her name was linked to an online pornography website, and that intimate photographs of her had been posted online on Tumblr by someone using the alias "buckslayer29".

The mother commenced a claim for damages against the father based on several intentional torts, and brought an *ex parte* motion for an Anton Piller order to seize the father's computer and phone to try to prove that he was, in fact, "buckslayer29". To obtain the necessary order, the mother had to lead evidence to meet the following test that was summarized by the Supreme Court of Canada in *British Columbia (Attorney General) v. Malik*, 2011 CarswellBC 923 (S.C.C.):

> [29] An *Anton Piller* order is, as our Court emphasized in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189 (S.C.C.), a thoroughly "draconian" measure equivalent to a private search warrant reserved for "exceptional circumstances" (para. 30) where "unscrupulous defendants" may if forewarned make "relevant evidence disappear" (para. 32). Accordingly:

> There are four essential conditions for the making of an *Anton Piller* order. First, the plaintiff must demonstrate **a strong *prima facie* case.** Second, the **damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious**. Third, there must be **convincing evidence that the defendant has in its possession incriminating documents or things**, and fourthly it must be shown that there is **a real possibility that the defendant may destroy such material before the discovery process** can do its work. . . . [emphasis added]

The judge who heard the *ex parte* motion was satisfied that the mother had met the test for an Anton Piller order, and granted the motion. Although the Anton Piller order did not lead to a "smoking gun", it did allow the mother to obtain a host of circumstantial evidence that showed that the father had posted the photographs in question.

The mother then brought a motion for summary judgment. The father responded by trying to set the Anton Piller order aside, arguing that it should never have been granted in the first place.

Justice Belzil found there was no basis to set aside the Anton Piller order. Furthermore, although there was no evidence before the Court to definitively prove that the father was "buckslayer29", Justice Belzil was satisfied that the substantial circumstantial evidence was sufficient to prove, on a balance of probabilities, that the father was the person who had posted the mother's private photographs online.

Borrowing from Justice Inglis' decision in *ES v. Shillington*, 2021 CarswellAlta 2211 (Q.B.) (see the October 11, 2021 (2021-39) edition of *TWFL*), Justice Belzil had no difficulty finding that the tort of public disclosure of private facts was part of the law of Alberta, and that the mother had established all four elements of the tort. In particular, his Honour was satisfied that:

(a) The father had publicized an aspect of the mother's private life;

(b) The mother did not consent to the publication;

(c) The matter publicized or its publication would be highly offensive to a reasonable person in the mother's position; and

(d) The publication was not of legitimate concern to the public.

Justice Belzil also found that the mother had made out her claim against the father for the tort of breach of confidence, the test for which was summarized by both the Alberta Court of Appeal and the Supreme Court of Canada in *Hutton v. Canadian Broadcasting Corp.*, 1992 CarswellAlta 391 (C.A.) at para. 15 and *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CarswellOnt 126 (S.C.C.) at para. 10, because she had established that:

(a) The information the father had conveyed about her was confidential;

(b) The mother had communicated the information in question to the father in confidence; and

(c) The father misused the information.

For further discussion about using the tort of breach of confidence in these types of cases, see also *Jane Doe 464533 v. D. (N.)*, 2016 CarswellOnt 911 (S.C.J.), where Justice Stinson stated as follows:

> [24] The third element of the tort, **use of the information to the detriment of the party communicating it, is ordinarily considered in commercial circumstances, where the recipient has misused the confidential information for commercial advantage, at the expense or to the detriment of the other party**. An essential element in any tort is harm to the plaintiff. **I see no rational basis to distinguish between economic harm and psychological, emotional and physical harm, such as was experienced by the plaintiff in the present case.** In any event, the possible future adverse impact on the plaintiff's career and employment prospects arising from the possibility that the video may someday resurface, also demonstrates actionable harm. [emphasis added]

That being said, Justice Belzil dismissed the mother's claim for relief based on the tort of intentional infliction of mental distress, because the mother had not produced any evidence to establish that she had sustained "visible and provable illness", which is one of the necessary elements of the tort (the others being flagrant or outrageous conduct by the defendant calculated to produce harm — see *ES v. Shillington*, 2021 CarswellAlta 2211 (Q.B.) at para. 47). This is one of the shortcomings of that specific tort.

Given the egregious nature of the father's conduct, Justice Belzil ordered him to pay the mother a total of $130,000 in damages ($80,000 in general damages, $25,000 in aggravated damages, and $25,000 in punitive damages).

Although the father tried to appeal Justice Belzil's decision (2021 CarswellAlta 3255 (C.A.)), he failed to serve his Notice of Appeal on time and, given his behaviour, multiple breaches of court orders, and the apparent lack of merit to his appeal, the Court of Appeal refused to grant him an indulgence and allow his appeal to proceed.

This is now the second time (insofar as we are aware) that a court in Alberta has awarded a plaintiff more than $100,000 for the type of horrific conduct that the father engaged in here (the other being *ES v. Shillington*, above). The $130,000 in damages that the Court ordered the father to pay in this case will not come even close to compensating the mother for what was done to her. But hopefully, if courts continue ordering people to pay significant damages for engaging in this type of behaviour, it will deter at least some people from doing so in the future.

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