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— Franks & Zalev - This Week in Family Law

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Contents

You Like Solicitor-Client Privilege? You Want to Protect Your Solicitor-Client Privilege? Read This.

Laliberté v. Monteith (2021), 57 R.F.L. (8th) 323 (Ont. Div. Ct.) — Sachs, Backhouse, and Kurke JJ.

By way of reminder for those of you that do not practice in Ontario, the Divisional Court is an appellate court in Ontario with jurisdiction over certain appeals, including final orders where less than $50,000 is in dispute, and appeals from interlocutory motions with leave.

In this case, the Divisional Court offered some important comments about implied waiver of solicitor-client privilege, and some critical practice tips about how a defendant's pleadings can sometimes result in a waiver of solicitor-client privilege.

Mr. Monteith appealed from an order requiring him to produce his former lawyer's matrimonial file, and dismissing his request that Ms. Laliberté be required to produce her former lawyer's matrimonial file. Both files related to a prior proceeding that resulted in Minutes of Settlement that were incorporated into a Separation Agreement. Ms. Laliberté brought a claim to set aside that Separation Agreement on the basis that Mr. Monteith had materially misrepresented his financial circumstances. According to Ms. Laliberté, while negotiating the Minutes of Settlement, Mr. Monteith had failed to disclose the negotiations and sale of his business ("Green Turtle") that was occurring at the same time.

Mr. Monteith argued that the motion judge erred in finding that he implicitly waived privilege by by placing his state of mind in issue because he had not made an affirmative allegation placing his state of mind in issue, which is generally a requirement to find an implied waiver. Mr. Monteith further argued that the motion judge erred in finding that Ms. Laliberté had not placed her state of mind and reliance on legal advice in issue when she pled that she would not have entered into the Separation Agreement had she known about the sale of his business.

Thus, the battle lines were set.

The parties married in June 1994, and separated in February 2012. They were divorced in June 2014. They had two older (university-aged) children.

After separation, Ms. Laliberté brought an Application for the usual panoply of family law relief, including a claim for an ownership interest in Mr. Monteith's business interests on the basis of constructive trust and joint family venture. The matter was settled with the assistance of a mediator over two sessions on August 20, 2013, and January 30, 2014. Minutes of Settlement were signed on January 30, 2014, and later incorporated into a Separation Agreement. During the negotiations and mediation, both parties were represented by experienced counsel.

During the settlement negotiations, Mr. Monteith represented that his business interests on separation were worth $7 to $8 million. For the negotiations, he had his CFO prepare a valuation analysis to corroborate that his business interests were worth about $7.9 million.

Meanwhile . . . and unbeknownst to Ms. Laliberté, negotiations for the sale of Green Turtle had started in October 2013. A non-binding (confidential) letter of intent for a sale at $30 million was signed on December 30, 2013, which was one month before the second mediation session that culminated in the Minutes of Settlement. The sale of Green Turtle was completed on April 14, 2014, just six days after the parties signed their Separation Agreement.

In February 2015, Ms. Laliberté learned of the sale of Green Turtle in the public press. She brought an Application in June 2015 to set aside the Separation Agreement on the basis that Mr. Monteith had materially misrepresented his financial circumstances when the parties negotiated the Minutes of Settlement and subsequent Separation Agreement. She also sought damages for the torts of deceit and negligent or fraudulent misrepresentation, and breach of fiduciary duty.

In his Answer dated October 8, 2015, for the first time, Mr. Monteith disclosed the existence of the letter of intent, and confirmed that he had received about $24 million gross ($18 million net) from the sale.

When he was questioned (examined for discovery), Mr. Monteith admitted that he intentionally did not disclose the negotiations and sale of Green Turtle that were occurring concurrently with the Minutes of Settlement and Separation Agreement.

Ms. Laliberté brought a motion for the production of Mr. Monteith's former matrimonial lawyer's file, and Mr. Monteith brought a cross-motion for the production of Ms. Laliberté's former matrimonial lawyer's file. The motion judge found that Mr. Monteith had implicitly waived solicitor-client privilege, but that Ms. Laliberté had not. As a result, she ordered Mr. Monteith to produce his former matrimonial lawyer's file.

Mr. Monteith sought leave to appeal to the Divisional Court, and his request was granted.

Solicitor-client privilege has been elevated to a substantive rule of law and a principle of fundamental justice by the Supreme Court of Canada. It protects the fundamental right of people to communicate with counsel and to seek legal advice and "must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis." [*R. v. McClure*, 2001 CarswellOnt 496 (S.C.C.) at para. 35; *Soprema Inc. v. Wolrige Mahon LLP*, 2016 CarswellBC 3278 (C.A.) at para. 50; *Maranda c. Québec (Juge de la Cour du Québec)*, 2003 CarswellQue 2477 (S.C.C.); *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 CarswellNat 2244 (S.C.C.); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 CarswellAlta 2247 (S.C.C.)]

As a determination of whether evidence is privileged is a question of law, the standard of review for the motion judge's decision was correctness: *Magnotta Winery Corporation v. Ontario (The Alcohol and Gaming Commission)*, 2020 CarswellOnt 1679 (S.C.J.) at para. 21.

Before commenting on the issue of implied waiver, however, we must ask one question, perhaps rhetorically. Why did Mr. Monteith's lawyer's file actually matter in this case?

When it comes to domestic contracts, in all Canadian provinces, full, fair and frank financial disclosure is key. The most common way — by far — for a party to attack a domestic contract is lack of or improper financial disclosure. In Ontario, the obligation is set out in s. 56(4) of the *Family Law Act*, R.S.O. 1990, c. F.3:

> **Setting aside domestic contract**
>
> 56(4) A court may, on application set aside a domestic contract or a provision in it,

> a. If a party fails to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made . . .

It is clear that, in family law, parties have a positive obligation to make full, fair and frank disclosure — even if the opposing party does not request it: *Patrick v. Patrick*, 2002 CarswellOnt 593 (S.C.J.) at para. 53; *LeVan v. LeVan* (2006), 32 R.F.L. (6th) 291 (Ont. S.C.J.) at para. 181, aff'd 2008 CarswellOnt 2738 (C.A.).

Nationally, in *Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.) at paras. 48-49, the Supreme Court held that the extent of non-disclosure, the degree to which it is found to have been deliberate, and the extent to which the settlement varies from the objectives of the legislation, are all relevant considerations when a court is determining whether to set aside a domestic contract. This point was further emphasized by the Ontario Court of Appeal in *Virc v. Blair* (2014), 42 R.F.L. (7th) 304 (Ont. C.A.), as well as by numerous appellate courts across the country.

There have been some cases where an agreement was set aside because details of salary increases or sales were not disclosed during negotiations. See, for example, *Baxter v. Baxter* (2003), 41 R.F.L. (5th) 23 (Ont. S.C.J.), where the husband did not disclose the sale of shares two years after separation which, although irrelevant to equalization, could have been relevant to support. See also *Giffin v. Giffin* (2018), 12 R.F.L. (8th) 360 (Ont. S.C.J.), where the husband purposefully did not disclose details of the negotiation of the sale of his business.

Given Mr. Monteith's failure to disclose the sale of the business, he did not have much chance of persuading a court to uphold the Separation Agreement in this case. Furthermore, since Mr. Monteith had already admitted to the non-disclosure, why was it important to access his privileged communications with his lawyer — especially given the importance of solicitor-client privilege? If there was operative non-disclosure, that should have been the end of it. Why the need to go further?

In any event, the Divisional Court started its analysis by confirming that the motion judge had correctly set out the test for implied waiver of solicitor-client privilege:

> [20] In determining whether privilege should be deemed to have been waived, the court must balance the interests of full disclosure for the purposes of a fair trial against the preservation of solicitor-client privilege: *Bank Leu AG v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 (Sup. Ct.), at para. 5. The onus lies on the party seeking to overcome the privilege to establish that the communication ought to be compelled from the party asserting the privilege: [*Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CarswellOnt 4488 (S.C.J.) at para. 76].
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> [21] A waiver of privilege may be express or implied. Implicit waiver may arise in two circumstances: (i) waiver by disclosure — once the privileged communication has been disclosed, the privilege attached to it is said to be lost; or (ii) waiver by reliance — by pleading or otherwise relying upon the privileged communication as part of a substantive position taken in the legal proceedings: *Super Blue Box*, at paras. 79-80; *Leitch v. Novac*, 2017 ONSC 6888 at para. 60.
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> [22] A deemed waiver, and an obligation to disclose a privileged communication, requires two elements: (i) **the presence or absence of legal advice is relevant to the existence or non-existence of a claim or defence**, in other words, the presence or absence of legal advice is material to the lawsuit; and (ii) **the party who received the legal advice must make the receipt of it an issue in the claim or defence**: *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649 at para. 30.
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> [23] A party will have waived solicitor-client privilege **where they have placed their state of mind at issue and given evidence that they received legal advice which, in part, formed the basis of that state of mind**. An implicit waiver can also arise by reason of the positions taken by a party which implicitly require the disclosure of communications between solicitor and client: *Spicer v. Spicer*, 2015 ONSC 4175 at paras. 13 and 15. [emphasis added]

Mr. Monteith argued that the motion judge conflated the three requirements for a finding of implied waiver, i.e. that: (a) Mr. Monteith's state of mind was an element of a claim or defence; (b) Mr. Monteith received legal advice relating to the issues of the claim or defence; and (c) Mr. Monteith relied on the legal advice to help form his state of mind that he had no obligation

to disclose. He also argued that the motion judge erred in finding that his state of mind about his understanding of his legal position or the advice he received was relevant to Ms. Laliberté's tort claims.

The Divisional Court agreed with the motion judge that the first requirement of a finding of implied waiver was met — that is, Mr. Monteith's state of mind was an element of the claim or defence with respect to Ms. Laliberté's tort claims:

> [27] In the Application, in addition to failure to disclose under s. 56(4) of the *FLA*, Ms. Laliberté pleads the torts of deceit and negligent or fraudulent misrepresentation.
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> [28] The Application specifically pleads that "the financial disclosure provided by [Mr. Monteith] was inaccurate, misleading and false and was provided with the intention that [Ms. Laliberté] would act upon his representations concerning his financial circumstances." In addition, at para. 28 of the Application, [Ms. Laliberté] pleads that [Mr. Monteith] "knowingly, recklessly, without belief in the truth of his representations concerning his financial circumstances, deliberately misled [Ms. Laliberté]" or that he was negligent in making the representations.
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> [29] [Ms. Laliberté] further pleads that [Mr. Monteith] "had a positive obligation to disclose the pending sale in advance of the execution of the Minutes of Settlement and/or the separation Agreement and failed to do so."
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> [30] The elements of the tort of deceit or fraudulent misrepresentation include knowledge that a representation of fact is false, or recklessness as to its truth an intent to deceive. While [Ms. Laliberté's] allegations of intentional torts raise the issue of [Mr. Monteith's] state of mind, I agree with [Mr. Monteith] that [Ms. Laliberté's] pleading alone cannot put his state of mind at issue. For example a defendant could defend against a claim of deceit without putting state of mind at issue, by denying that the representation of fact was false or by denying that the plaintiff relied on the representation.

According to the motion judge, Mr. Monteith went further than just denying that the representation of fact was false or denying that Ms. Laliberté had relied on Mr. Monteith's representations as to the value of Green Turtle. This allowed the motion judge to make a finding that Mr. Monteith put his state of mind at issue *by denying the allegation that he knowingly, recklessly and/or deliberately misled* Ms. Laliberté or, alternatively *that he was negligent in making the representation*. According to the Divisional Court, the motion judge was, therefore, entitled to make the finding that Mr. Monteith's state of mind was material to his defence. That would be strike one on the privilege issue.

We pause here for a brief public service announcement: counsel must be very careful when drafting a defendant's pleadings to avoid an unintentional waiver of solicitor-client privilege. While an allegation in the plaintiff's pleading alone cannot put the defendant's state of mind in issue, it is clear that the defendant's denial of that allegation *may do exactly that*.

The second question was whether Mr. Monteith received legal advice relating to the claim or the defence — because if there was no legal advice, his state of mind could not have been influenced by the legal advice he received.

In his Answer to Ms. Laliberté's claim to set aside the Separation Agreement, Mr. Monteith stated as follows:

> 7. There is no basis to set aside the Separation Agreement. It incorporates the terms of the Minutes which were a complete and final resolution of the issues between the parties, signed by both parties and witnessed. The parties both had independent legal advice, they exchanged financial disclosure to each other's satisfaction, and there was no material misrepresentation by [Mr. Monteith]. [Ms. Laliberté's] application should be dismissed with costs.
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> . . . . .
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> 26. At all times, the parties had independent legal advice. [Mr. Monteith] from Harold Niman and [Ms. Laliberté] from Stephen M. Grant and Megan Edminston as stated in paragraph 14.14 of the Separation Agreement. The Separation Agreement further provides that the parties:
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> (i) Understood their respective rights and obligations under the Agreement and its nature and consequences;

(ii) Acknowledged that the Agreement is fair and reasonable;

(iii) Acknowledged that they were not under undue influence or duress; and

(iv) Acknowledged that both signed the Agreement voluntarily.

When he was examined, Mr. Monteith *admitted* that he understood his obligations with respect to providing financial disclosure to Ms. Laliberté; that the sale of Green Turtle for $30 million constituted a significant change in his financial circumstances; *and that at all material times he relied on the advice of his former lawyer*. He admitted that he intentionally did not disclose the negotiations and sale of Green Turtle even though he was negotiating with Ms. Laliberté at the same time.

Based on Mr. Monteith's pleadings and admissions, it was easy for the motion judge to rely on *Bank Leu AG v. Gaming Lottery Corp.*, 1999 CarswellOnt 3365 (S.C.J.), for the proposition that (at para. 5), "When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice." To that end, the motion judge found as follows:

> [33] . . . While he avoids specifically stating that he had no obligation to disclose the Green Turtle transaction or that he relied on legal advice in not disclosing the transaction, **the statement regarding legal advice implies that he was aware of his legal obligations. [Mr. Monteith's] reliance on legal advice is implicit in the Answer and integral to his defence.** In effect, **[Mr. Monteith's] defence is that he had no obligation to disclose the transaction, which turns on the legal advice he received at the time.** Alternatively, his **defence is that he did not knowingly, deliberately or recklessly fail to disclose because, despite having legal advice "at all times," he did not know that he had an obligation to disclose the transaction.** Either way, the legal advice is central to his defence. [emphasis added]
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> . . . . .
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> [37] . . . [Mr. Monteith] has also pointed out on this motion and in his Answer that the Green Turtle was confidential and not binding when the Agreement was executed, and that both parties could have walked away until that time. **The necessary implication is that [Mr. Monteith] understood that he had no obligation to disclose a non-binding transaction.** [emphasis added]

The Divisional Court determined that the motion judge was entitled to find that Mr. Monteith had relied on legal advice on issues integral to his defence. However, we suggest that Mr. Monteith's single admission at the examination — that he relied on the advice of his former lawyer at all material times — was the problem here. Absent that admission, it would have been hard, if not impossible, for the Court to have drawn a line from the legal advice to the non-disclosing conduct in issue. The lesson here is simple. Never allow your client to say anything about legal advice. Ever. Never ever ever.

Finally, the third question: had Mr. Moneith relied on legal advice to form his state of mind that he had no obligation to disclose? Mr. Monteith argued that the motion judge never considered whether he was using the advice to defend against Ms. Laliberté's claims. But the Divisional Court did not agree, and relied on the following finding by the motion judge:

> [42] . . . While [Mr. Monteith] has avoided saying that the basis for his decision not to disclose was legal advice, the implication is unavoidable . . .

But is that right? Is the implication unavoidable? Could Mr. Monteith have simply decided that he was going to take the risk and not disclose? Why was the "unavoidable implication" that the basis for Mr. Monteith's non-disclosure was legal advice? We struggle with that. And given what the Supreme Court of Canada has to say about privilege being sacrosanct — and that there was really no need for Ms. Laliberté to access Mr. Monteith's lawyer's file — no one should have to struggle understanding the reasons for a finding of implied waiver of privilege. And on top of that was the fact that the Separation Agreement here was clearly going to be set aside for non-disclosure.

Mr. Monteith obliquely raised this issue by suggesting that his state of mind was irrelevant because Ms. Laliberté only had to show a failure to disclose to set aside the Separation Agreement. However, the Divisional Court agreed with the motion judge that:

> [40] . . . This submission disregards the fact that the parties' pleadings, which allege and defend against intentional torts, have put [Mr. Monteith's] state of mind squarely in issue. Moreover in *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at paras. 48-49, the Supreme Court of Canada held that the extent of a party's failure to disclose and the degree to which it is found to have been deliberately generated are relevant facts in determining whether a court will intervene in setting aside a domestic contract: see also *Virc v. Blair*, 2014 ONCA 392, 119 O.R. (3d) 721 at paras. 65-66. In *Griffin*, the court set aside a separation agreement where the husband deliberately failed to disclose the existence of letters of intent and the sale of shares.

But, again, we struggle to see how this answers the question as to whether Mr. Monteith relied on legal advice to intentionally or deliberately mislead Ms. Laliberté.

Counsel for Mr. Monteith raised the reasonable concern that the effect of finding implied waiver here would be at least the risk of implied waiver any time a plaintiff pleads intentional tort or negligent misrepresentation and the opposing party receives legal advice, whether or not the party chooses to rely on it — and that would work harm to solicitor-client privilege, a principle of fundamental justice.

The Divisional Court did not agree because, in the words of the Court, this case entailed "more than a bald allegation of misrepresentation or a failure to disclose." Respectfully, we're not sure why that matters.

To further support the finding of reliance on legal advice, the Divisional Court noted that the motion judge also made the following findings:

> [35] In the event that the parties' pleadings are not sufficient to find that Mr. Monteith waived solicitor-client privilege, [Mr. Monteith's] responses on questioning further support such a finding. Under questioning, Mr. Monteith stated as follows:
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> • He did not contemplate postponing the January 2014 mediation after signing a letter of intent to sell Green Turtle;
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> • He had his Chief Financial Officer, Michael Brandt, prepare a valuation analysis that stated that his business interests were valued at approximately $7.9 million, as shown in his financial statement dated January 10, 2013;
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> • Mr. Brandt's valuation was conveyed to [Ms. Laliberté] and her counsel at the mediation in January 2014;
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> • By the time the parties attended mediation in January 2014, there had been a change to the value of his business interests but no updated financial statement was produced;
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> • At the time, [Mr. Monteith] was involved in negotiations to sell Green Turtle and had sold another company for $18 million;
>
> • He did not disclose the Green Turtle transaction at any time prior to the signing of the Agreement, even though it was being negotiated at the same time;
>
> • The sale of Green Turtle for $30 million constituted a significant change in his financial circumstances; and
>
> • The non-disclosure of the Green Turtle transaction was intentional.

But, again, we fail to see how these facts lead to the necessary implication that Mr. Monteith did not disclose based on legal advice. Rather, the Divisional Court suggests that the "particular constellation of facts" in this case support the motion judge's findings.

At the risk of repetition, we keep coming back to the same point. There was no need for a finding of waiver here, and no need for Ms. Laliberté to gain access to Mr. Monteith's lawyer's file. Mr. Monteith admitted the non-disclosure was intentional. Respectfully, perhaps that should have been the end of it?

To be sure that privilege was not overridden too substantially, pursuant to the Supreme Court of Canada's direction that solicitor-client privilege be as close to absolute as possible, the Divisional Court did add one *caveat* to the motion judge's decision: the disclosure from the lawyer's file was to be limited to that part of the matrimonial file that was relevant to the issue of the duty of financial disclosure regarding the Green Turtle negotiation and sale.

In her decision, the motion judge also considered when, if ever, a signed Certificate of Independent Legal Advice could be used as evidence of a waiver of privilege. However, because the motion judge declined to rely on the Certificate of Independent Legal Advice (and the caselaw regarding it) as evidence of waiver of solicitor-client privilege, the Divisional Court did not have to deal with that issue. Therefore, we will address it here, briefly.

Some cases have held that a Certificate of Independent Legal Advice, signed by a lawyer, actually constitutes a waiver of privilege as to the matters addressed in the Certificate. See, for example, *Griffore v. Adsett* (2001), 18 R.F.L. (5th) 63 (Ont. S.C.J.) and *Balsmeier v. Balsmeier* (2014), 50 R.F.L. (7th) 390 (Ont. S.C.J.). But with the greatest of respect to those smarter than us that have held otherwise, and very respectfully, this just cannot be right. To help prove a Separation Agreement is entered into voluntarily, without duress, and with legal advice, best practice dictates that both parties have their lawyers provide Certificates of Independent Legal Advice. It cannot be that those Certificates can then be used as the gateway to waive privilege over all of the advice a person has received in coming to the terms of a Separation Agreement — unless the very claim to set aside the Agreement is the failure to understand the Agreement or duress, undue influence, etc.

As for Mr. Monteith's claim that Ms. Laliberté had impliedly waived privilege? This was a non-starter. Ms. Laliberté could not have received legal advice (or acted on legal advice) relating to the Green Turtle sale during the settlement negotiations when she did not know about it.

The Capacity to Say "I Do"

Tanti v. Tanti, 2021 CarswellOnt 20429 (C.A.) — Lauwers, Harvison Young and Sossin JJ.A.

It is not that often the issue of "capacity to marry" arises, so when it does, it is worth a read and a refresher.

Paul and Sharon were married on July 27, 2019.

On September 12, 2019, Paul's son, Raymond, claimed a guardianship order over his father and his father's property. That order was granted on the basis that Paul was incapable of personal care and managing property. As a result, the Office of the Public Guardian and Trustee appointed counsel for Paul.

The Court then ordered that the issue of the validity of the marriage between Paul and Sharon would be tried as a threshold issue. At that trial, in December 2020, Justice Mandhane found that Paul had capacity to marry. Raymond appealed on behalf of his father.

At the trial, the sole issue was Paul's capacity to marry Sharon in July 2019. And proof of lack of capacity would render the marriage void *ab initio*: *Ross-Scott v. Groves Estate*, 2014 CarswellBC 684 (S.C.).

In the face of an otherwise legal marriage, a person challenging the marriage on the basis of lack of capacity — Raymond in this case — has the burden of establishing that a party — Paul in this case — lacked capacity to marry: *Hunt v. Worrod*, 2017 CarswellOnt 19671 (S.C.J.) at para. 13; *Sung Estate, Re* (2004), 9 R.F.L. (6th) 229 (Ont. C.A.). Furthermore, the evidence must be of a "sufficiently clear and definite character" as to constitute more than a "mere" preponderance of the evidence: *Reynolds v. Reynolds*, 1966 CarswellBC 139 (S.C.) at p. 90-91 (B.C.S.C.).

With respect to the relevant law of capacity to marry, the trial judge stated as follows [some citations omitted]:

> [40] In determining legal capacity, courts are asked to balance individual autonomy against the vulnerability that can come with age or disability: *Hunt* at para. 10. The overarching goal is to ensure that people retain decisional autonomy in as many domains as possible, even if they must be protected from harm in others . . . Indeed, people with mild cognitive impairment, dementia or Alzheimer's disease can be capable decision-makers depending on the situation . . .
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> [41] The determination of legal capacity is fluid: it is decision, time, and situation specific: *Hunt*, at para. 13 . . .
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> [42] The requirements of legal capacity vary significantly as between different areas of law and must be applied to the specific decision, act or transaction at issue. For example, it is generally agreed that the capacity required to marry is lower than the capacity required to execute a will or grant a power of attorney for property or personal care . . .
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> [43] The test for capacity to marry is a simple one. The parties must understand the nature of the marriage contract, and the duties and responsibilities that flow from it: *Chertkow v. Feinstein (Chertkow)*, 1929 CarswellAlta 23, 24 Alta. L.R. 188 (Alta. C.A.), at p. 191. Understanding the content of the marriage contract does not require a high degree of intelligence; the parties must agree to live together and love one another to the exclusion of all others: *Lacey v. Lacey (Public Trustee of)*, [1983] B.C.J. No. 1016 (B.C. S.C.).
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> [44] The court in *Ross-Scott v. Groves Estate*, 2014 BCSC 435 (B.C. S.C.) at para. 200 noted that the inability to manage one's financial affairs would "not necessarily impact a person's ability to consciously consider the importance of a marriage contract. Nor do they necessarily impact formation of an intention to marry, a decision to marry, or the ability to proceed through a marriage ceremony." A person may be capable of marrying despite having been declared mentally incompetent or having had a guardian for person or property . . .
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> [45] The Court of Appeal for Ontario in *Knox v. Burton* (2004), 6 E.T.R. (3d) 285 (Ont. S.C.J.), aff'd (2005) 14 E.T.R. (3d) 27 (Ont. C.A.) noted that the assessment of capacity must be time specific: *Costantino v. Costantino*, 2016 ONSC 7279 (Ont. S.C.J.) at para. 53. Expert examinations or assessments that do not state when the incapacity occurred, or are not contemporaneous with the giving of instructions, may be less probative than the evidence of the individual who took the person's instructions at the time: *Palahnuk v. Palahnuk Estate*, [2006] O.J. No. 5304 (Ont. S.C.J.), at para. 4.
>
> [46] Finally, capacity is situation specific: *Hunt*, at para. 13. I must assess Paul's specific capacity to marry Sharon, which makes the overall context of their relationship relevant.

With the benefit of four days of evidence and eight witnesses, Justice Mandhane found that Paul had the requisite capacity to marry. This marriage was not a "rush to the altar", but a progression of a relationship between mature adults.

Justice Mandhane found no persuasive evidence that, at the time of the marriage, Paul's capacity or cognitive status had diminished to the point that he was unable to make decisions regarding his day-to-day affairs or living arrangements.

In coming to this conclusion, Justice Mandhane rejected the evidence of several experts who testified on behalf of Raymond, but relied on the direct evidence of a lawyer Paul consulted, Mr. Brizan, who testified that Paul was able to provide him with coherent instructions to prepare a power of attorney over property at the time of the marriage.

The Court of Appeal was satisfied that her Honour applied the correct test for the capacity to marry. For a marriage to be valid, the parties must understand the nature of the marriage contract and the duties and responsibilities that flow from it. Her Honour also considered the fact that the inquiry had to be situation specific.

The contract of marriage is not complicated. A person has the capacity to enter the contract of marriage if he or she has the capacity to understand the nature of the contract of marriage and the duties and responsibilities it creates: *Hart v. Cooper*, 1994 CarswellBC 784 (S.C.); *Devore-Thompson v. Poulain*, 2017 CarswellBC 2024 (S.C.).

Capacity to marry must also involve some understanding of with whom a person wants to live and some understanding that it will have an effect on one's future in that it will be an exclusive mutually supportive relationship until death or divorce: *Devore-Thompson v. Poulain*. These descriptions are all, of course, variations on a theme: the starting point for understanding the test for capacity to marry is the notion that a marriage is a contract and the contracting parties must possess the requisite legal capacity to enter the contract.

Raymond also suggested that Justice Mandhane erred in citing academic articles that were not referenced by either party. This is actually a question that is often bandied about by counsel — can a judge refer to authorities or academic articles that were not raised in argument?

The Court of Appeal confirmed that it is in not inappropriate for a judge to consider relevant authorities regardless of whether they were raised by the parties: *Heron Bay Investments Ltd. v. R.*, 2010 CarswellNat 2552 (F.C.A.), at para. 22.

Then Raymond suggested that Justice Mandhane had erred by rejecting the expert evidence before her. But a judge can accept all, some or none of expert opinion evidence: *Frondall v. Frondall* (2020), 49 R.F.L. (8th) 293 (Sask. C.A.), especially when the judge provides a cogent explanation for rejecting it, as was done here. Her Honour explained that the expert evidence as to capacity in this case was either not contemporaneous with the marriage or not relevant to the capacity to marry and therefore irrelevant. This ground of appeal went nowhere.

Finally, for good measure, Raymond weakly alleged a reasonable apprehension of bias on the part of Justice Mandhane. However, the allegation of bias was ultimately based on the fact that her Honour did not find in Raymond's favour. That would make a judge biased against one party in every case. Uh, no.

The appeal was dismissed. Paul had capacity to marry.

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