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— **Franks & Zalev - This Week in Family Law**

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It's the Latest Dance Craze: The Alberta Appellate Arbitral Two-Step

Esfahani v. Samimi (2022), 73 R.F.L. (8th) 330 (Alta. C.A.) — Paperny, Ho, and Kirker JJ.A.

In *Esfahani*, the Alberta Court of Appeal set out the correct process in Alberta for appealing an arbitral decision, and discussed some of the larger policy issues surrounding appealing arbitral awards.

The parties arbitrated their parenting issues. The father was not entirely happy with the result, and wanted to appeal certain aspects of the decision. The mother argued that, before the father could appeal, he first had to get leave to appeal in a separate hearing. The chambers judge, however, directed that the father's application for leave to appeal would be heard *together* with the substantive appeal on the merits.

The mother sought leave to appeal the chambers judge's decision, arguing that it was wrong in law, and that it both procedurally and substantively impacted her litigation rights. Her request for leave to appeal was granted, and the Court of Appeal ultimately determined the mother was correct, the chambers judge was incorrect, and the father would have to first seek leave to appeal, and then appeal if successful.

In Alberta, appeals from arbitral awards are governed by s. 44 of the *Arbitration Act*, R.S.A. 2000, c. A-43 (the "*Arbitration Act*"), which reads in part:

44(1) **If the arbitration agreement so provides**, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

44(2) If the arbitration agreement **does not provide that the parties may appeal an award to the court on a question of law**, a party may, with the permission of the court, appeal an award to the court on a question of law.

44(2.1) The court shall grant the permission referred to in subsection (2) 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) the determination of the question of law at issue will significantly affect the rights of the parties.

44(3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

[emphasis added]

The parties had signed a "standard form" arbitration agreement that allowed them to check which "right of appeal" sub-clause they wished to rely on, but no option was checked:

15. Any Award may be subject to Remedies under the *Arbitration Act*: (choose either (a) or (b) or (c))

(a) In accordance with subsection 44 and/or 45 of the *Arbitration Act*;

(b) A party may apply for Remedies under the *Arbitration Act* on (choose one or more of the following)

A question of law,

A question of fact; or

A question of mixed fact and law;

(c) The parties agree that there will be no right of Remedies under the *Arbitration Act* from the Arbitrator's Award.

The mother argued the chambers judge had erred in directing the application for leave to appeal and the substantive appeal to be heard at the same time. She argued (sensibly, in our view) that permission to appeal first had to be obtained before an appeal on the merits could be scheduled and argued. Specifically, the mother argued that collapsing the leave application and substantive appeal into one hearing would effectively convert an appeal requiring leave into an appeal as of right, as the focus of the single hearing would be on the substantive portions of the appeal. An application for leave to appeal would be rendered moot if that application was heard contemporaneously with the appeal, as the judge hearing both would inevitably just decide the appeal on the merits.

The Court of Appeal agreed with the mother.

Subsection 44(2) of the *Arbitration Act* was meant to serve as a statutory "gatekeeper" such that where leave is required, there can be no appeal until leave is granted. Furthermore, it would be unfair to force a responding party to incur the costs to prepare for an appeal that might never happen.

The legislative intent behind s. 44(2) of the *Arbitration Act* was to create a screening provision, restricting appeals to questions of law alone. A bifurcated process was *necessary* to comply with the statute. The Court of Appeal stated that the legislature had intended this bifurcated process to protect (and arguably to emphasize) the policy toward the finality of arbitral awards, and to ensure that arbitrations were efficient, economical and involved as little judicial intervention as possible. The Court stated that, but for exceptional circumstances, judicial involvement in arbitrations ought to be restricted "as a matter of law". The involvement of courts "detrimentally affects" the "well-recognized benefits of arbitration: speed, efficiency and cost."

Where parties choose to submit their issues to arbitration and do not expressly elect the broader review remedies, the necessary first step is to determine whether the test for leave to appeal has been met. Only after that determination, if positive, can an appeal proceed.

The Court of Appeal then set out three clear principles to avoid future confusion:

(a) An appeal does not *exist* unless permission to appeal is granted.

(b) If parties do not make the required election, permission to appeal is required and will be granted on questions of law only, subject to s. 44(3) of the *Arbitration Act*.

(c) An application for leave to appeal must be heard and decided first, and separately, not contemporaneously with the substantive appeal.

If parties wish to depart from this regime, they may do so as a matter of contract. That is, on the consent of both parties, the leave and substantive appeal stages could be collapsed into one hearing. But absent such consent, two steps it is.

May as Well Read These Now Because They're Coming to a Court Near You

Czyzewski v. Fabro, 2022 CarswellOnt 11981 (S.C.J.) - Shore J.

In 2020, the Association of Family and Conciliation Courts - Ontario Chapter ("AFCC-O") published a Parenting Plan Guide, and it updated the Guide in 2021 (the most recent version can be found online at <https://afccontario.ca/parenting-plan-guide-and-template>). The Parenting Plan Guide, as Justice Chappel explained in *McBennett v. Danis* (2021), 57 R.F.L. (8th) 1 (Ont. S.C.J.) at para. 92, "summarizes basic social science knowledge about the effects of parental separation on children, provides suggestions and guidance to help improve communications and cooperation between separated parents and offers valuable guidance about formulating parenting arrangements that meet the needs of the children." So that sounds pretty helpful.

The Parenting Plan Guide is not legislated, and it is not binding on the courts. However, neither were the *Spousal Support Advisory Guidelines* (the "SSAGs") when the initial draft proposal was released back in 2005, or when the final version was released in 2008. And, as we all know, it did not take long for the SSAGs to become largely presumptive.

In the 2022-23 (June 27, 2022) edition of *TWFL*, we discussed four recent cases where judges gave significant weight to the Parenting Plan Guide, and posited that we were seeing the start of a trend towards the courts giving more and more weight to the Parenting Plan Guide when deciding what parenting arrangements would be in a child's best interests (see "Hey! Check Out The AFCC-Ontario Parenting Plan Guidelines! They Might Just Catch On! But Should They?").

Justice Shore's recent decision in *Czyzewski* provides further evidence that this trend is already well underway, at least in Ontario.

The parties in *Czyzewski* were never married, and they never cohabited. However, they had a 20-month-old son together. The child had always resided primarily with the mother, but was also having regular parenting time with the father, including weekly overnights, and two full days every other week.

The father brought a motion to significantly expand his parenting time. He asked for a week-on/week-off schedule, as he had been able to arrange his schedule so he would be off work every other week so he could care for the child full-time. For reasons that are not discussed in the decision, the father was not able to arrange his work schedule to be able to have shorter, but more frequent, blocks of time with the child.

The mother opposed the father's motion, and argued that it would not be in the child's best interests to be away from his primary caregiver for more than two to three days in a row. She also argued that such a schedule would be contrary to the Parenting Plan Guide, and relied on the prior cases we discussed in our the 2022-23 (June 27, 2022) edition of *TWFL*:

The Mother referred to the decision of Justice McGee in *Melbourne v. Melbourne*, 2022 ONSC 2299, 72 R.F.L. (8th) 84, where support and weight is given to the "extensively researched" AFCC Parenting Guidelines. Specifically, at para.19:

[19] The AFCC Parenting Guidelines were prepared by the Ontario Chapter of the Association of Family and Conciliation Courts (AFCC-Ontario) to assist parents and their professional advisors in specifically developing the best, child-focused, and realistic parenting plans . . .

[20] I agree with Justice Chappel in *McBennett v. Davis*, 2021 ONSC 3610, when she states in paragraph [92] that:

The AFCCO-O Guide summarizes basic social science knowledge about the effects of parental separation on children, provides suggestions and guidance to help improve communications and cooperation between

separated parents and offers valuable guidance about formulating parenting arrangements that meet the needs of the children.

[21] As further stated by Justice Kraft in *H. v. A.*, 2022 ONSC 1560:

The parenting plan guide produced by the Association of Family and Conciliation Courts — Ontario ("AFCC-O") has been found by many courts to be of great assistance in determining parenting schedules that are in a child's best interests, depending on the age of the child and his/her developmental stage. While not binding on the courts, the Guide provides a great deal of helpful information and reflects a professional consensus in Ontario about the significance of current child development research for post-separation.

[footnotes omitted]

Justice Shore agreed with Justice Chappel and Justice Kraft that the Parenting Plan Guide contained "helpful information in understanding a child's developmental stage and schedules", and relied on it for the proposition that for toddlers (18-36 months), equal time schedules may be appropriate "if parents have fully shared in the caretaking arrangements before the child has reached this age, and the child has an easy temperament", but only if "the separations from each parent are not too long (no more than two to three days or two nights for example)."

However, based on the information contained in the Parenting Plan Guide, there were two serious problems with the father's motion. First, the parents had not "fully shared in the caretaking arrangements", as the child had always resided primarily with the mother. According to the Parenting Plan Guide, therefore, an equal time sharing arrangement was contraindicated.

Second, the father's proposed schedule would have required the 20-month-old child to be separated from the mother for significant periods of time, and the father's work schedule precluded the Court from considering other potential options for an equal or close to equal time sharing arrangement:

While both parents are good parents, the Mother and Father have not been equal parents to date. **But even if they were equal parents, it is not recommended that children of [the child's] age spend more than two to three days away from either parent. The Father's schedule does not permit an equal sharing of time where the child is not away from either parent for more than a few days.** The Father's schedule would mean that [the child] would be away from his Father for a week. This separation is too long for the parties to have an equal time-sharing schedule at this time. **The child should not go for a full week without seeing his Mother (with only one night in the middle), and then go an entire week without seeing his father, just to have an equal time-sharing arrangement.** This is not in the best interest of the child at this age. This means the Mother is going to continue to be the primary parent for now. To me, this does not mean that the Father's time should be restricted with [the child], but more that [the child] should not spend extended time away from his Mother. There is a conceptual difference. As the child gets older and can be away from his Mother for longer periods of time, the schedule may well develop into a week about schedule.

In this case, I agree with the Mother, that it is not in [the child's] interest, at this age, and in these circumstances, to spend too long a period of time away from his Mother. Again, **this in no way is a reflection on the Father's ability to care for the child, but more a reflection on the child's developmental needs at this time in his life.** [emphasis added]

However, Justice Shore still found that it would be appropriate to increase the father's parenting time from two non-consecutive overnights during every two week period, to five overnights broken up into one 2-night block and one 3-night block, which was still a significant increase in the circumstances.

There are now more than 15 decisions available on *Westlaw* that reference the Parenting Plan Guide, which is a very significant number given that it was only released in 2020. There are not yet any reported decisions from anywhere other than Ontario, and the Parenting Plan Guide has still not been considered by an appellate court, but it is only a matter of time before both of these things happen. While it remains to be seen how much weight the courts end up giving to the Parenting Plan Guide, it would

not surprise us at all if, as happened with the *SSAGs*, the Guide becomes largely presumptive, subject only to the evidentiary particularities of the case.

In the meantime, if you have yet to read the Parenting Plan Guide . . .

I Didn't Have Time to Write a Short [Factum], so I Wrote a Long One Instead (With Apologies to Mark Twain)

Equustek Solutions Inc. v. Jack, 2022 CarswellBC 1468 (C.A.) — Hunter J.A.

This is not a family law case. But in *Equustek*, Justice Hunter of the British Columbia Court of Appeal offered some useful thoughts on factum writing — and as to the difference between an "argument factum" (to make argument at trial) and an appellate factum. And, hey — if you're going to learn about writing appellate factums, you may as well learn from someone that reads them all . . . day . . . long.

Every appellate court in the country has rules about the "permitted" length of factums. In B.C. and Ontario, for example, the limit is 30 pages, absent leave to file a lengthy factum.

In *Equustek*, the appellants wanted to file an 80-page factum in a complicated appeal. A draft of the factum was attached to the motion material seeking leave.

The respondents were of the view that a lengthy factum was not necessary and that the appellants could make their submissions within the normal 30-page limit.

In considering the issue, Justice Hunter began with principles regarding the preparation of factums in the Court of Appeal.

An appellate factum is meant to provide the Court and the respondent with an outline of the arguments that will be advanced and a list of the authorities to be cited: *Sga'nisim Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2012 CarswellBC 334 (C.A. [In Chambers]). That is, the appellant's factum serves a dual purpose.

First, the factum is to signal the issues in dispute so as to allow the respondent to address them. Second, the factum is meant to alert the court as to the issues in dispute and as to the appellant's position on those issues: *Gould v. Sandau*, 2004 CarswellBC 347 (C.A. [In Chambers]) at para. 10.

According to Justice Hunter — and this may surprise some — a factum is *not* meant to be a full argument of the appeal — and, in this sense, it is different from written argument at trial (which often is considered to be a factum of sorts) where it is actually necessary to cull all the evidence in an effort to persuade the judge to make specific conclusions. Rather, in a factum, the statement of facts is not to be a summary of the evidence, but of the facts that were found by the trial judge or are otherwise not in dispute. Those are the facts on which the appeal will proceed — unless the appellant can convince the Court of Appeal that a factual finding was made absent evidence or that the trial judge committed a palpable and overriding error of fact.

Justice Hunter also noted the direction in Rule 22 of the Court of Appeal Rules that requires a "concise" statement of the facts, alleged errors, and outline of argument. This direction is meant to avoid "prolixity."

In addition, the 30-page limit, noted Justice Hunter, was set with reasonably complex cases in mind. This means that complicated cases may need the full 30 pages; and less complex cases should need fewer pages: *Ma v. Vansanten*, 2017 CarswellBC 3664 (C.A.). Therefore, an applicant for a lengthy factum must show why extra pages are necessary. And the mere fact of a lengthy judgment being appealed from is not sufficient. Counsel are obliged to focus their arguments.

Appellate courts across the country take a similar view. Factums should avoid an "information dump" in which all findings below are attacked. Leave to file a lengthy factum is exceptional and granted sparingly and in special circumstances. See for example: *House of Sga'nisim v. Canada (Attorney General)*, 2012 CarswellBC 334 (C.A. [In Chambers]) at para. 11; *R. v. Port Chevrolet Oldsmobile Ltd.*, 2008 CarswellBC 2331 (C.A. [In Chambers]) at para. 11; *Brown v. Lowe*, 2000 CarswellBC 2414 (C.A. [In Chambers]); *OZ Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2020 CarswellOnt 12080 (C.A.);

McLeod Estate v. Cole et al, 2010 CarswellNB 355 (C.A.); *Saint John (City) v. I.A.F.F., Local 771*, 2010 CarswellNB 355 (C.A.); *Working Families Ontario v. Ontario*, 2021 CarswellOnt 7284 (S.C.J.).

As for the "usual" arguments counsel make for permission to file a lengthy factum, in *OZ Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2020 CarswellOnt 12080 (C.A.), aff'd 2020 CarswellOnt 14922 (C.A.), the Court noted:

[7] The fact that the appeal raises important and complicated questions of fact or law, there are numerous grounds of appeal, the underlying proceedings have been ongoing for many years, or the trial was lengthy, does not automatically justify an extension of the page limit. These circumstances inform many appeals that are nevertheless contained within the 30-page factum limit.

Here, the long and complicated trial (dealing with issues of breach of confidence, passing off, breach of copyright and conspiracy) took place over 73 days.

Notwithstanding the complex factual matrix, Justice Hunter was not convinced that an 80-page factum was necessary. His Honour was concerned (after reviewing the draft appellant factum) that the appellants were simply looking to attack the findings of the trial judge and inviting the Court of Appeal to retry the case. The factum was more akin to argument at trial than a "concise statement" of the facts and law. It did not help the appellants that the first alleged error of law was described as a "failure to consider critical evidence and submissions in the case as a whole."

On balance, Justice Hunter was of the view that an 80-page factum was not required, and that to allow it would "place an inappropriate burden on the appeal."

However, having reviewed the draft factum, "with some reluctance" Justice Hunter was prepared to allow for an extra 10 pages so as to allow the appellants to feel that they had a full opportunity to present their case.