FAMLNWS 2022-35
Family Law Newsletters
September 26, 2022

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

"Quick & Dirty" Arbitration Is Fine; Trojan Horse Appeals Are Not

Singh v. Modgill, 2022 CarswellAlta 1374 (Q.B.) — Feasby J.

Many parties choose to submit their family law issues to arbitration. But rarely are both parties wholly satisfied with the result. And when a party is unhappy with the result, "unfairness" with respect to the process is a common claim. *Singh v. Modgill* is one such case, and from it we can learn two important things: (1) the arbitral process need not mirror the trial process; and (2) "fairness" is often in the eye of the beholder.

Singh and Modgill had been litigating for *15 years*. As the trial loomed, they agreed to submit their issues to the mediation/arbitration process. Importantly, both parties agreed that they wanted the arbitration process to be "quick and dirty."

There were two issues in dispute:

> 1. Singh and Modgill disagreed as to how to calculate the profits from a venture which they had agreed to split equally; and
>
> 2. There were claims that Modgill was holding a property in trust for Singh and his wife.

The Mediation/Arbitration was conducted pursuant to Alberta's *Arbitration Act*, R.S.A. 2000, c. A-43 (the "*Act*").

The parties entered a Mediation/Arbitration Agreement (the "Med/Arb Agreement") on September 20, 2021. The mediation was scheduled for October 8, 2021. The Med/Arb Agreement stated that, if the mediation was not successful, the mediation would immediately be converted to an arbitration, in which case the arbitrator would provide a decision on or before October 13, 2021 (*i.e.*, five days later). The relevant clause read as follows:

> To the extent the contemplated Mediation phase of the Med/Arb process does not result in resolution of all aspects to the Dispute, the Parties hereby commit to submitting whatever issues remain outstanding to the Dispute post-Mediation to an Arbitration proceeding. **The Parties acknowledge and accept that time is of the essence**, as is efficiency (time and cost) in completing appropriate submissions to be followed by the rendering of a final Award by the Arbitrator. It is agreed that any and all closing submissions will be delivered by opposing counsel immediately following the Mediation phase on October 8, 2021, with the Final Award by the Arbitrator to be circulated on or before October 13, 2021. [emphasis added]

While the Med/Arb Agreement did not expressly set out a process for the arbitration, it did (as noted above) clearly state that "any and all closing submissions" were to be delivered immediately after the mediation phase on October 8, 2021. As part of the mediation, the parties submitted written briefs of argument along with supporting documentation that included pleadings,

transcripts from examinations, affidavits and documents. And, importantly, *neither* party complained about the process in their written briefs.

The Arbitrator released his Award on October 13, 2021, as required in the Med/Arb Agreement. (As arbitration is a creature of contract and statute, once the time to deliver an award has expired, the arbitrator has arguably lost jurisdiction: *Flock v. Flock* (2007), 40 R.F.L. (6th) 303 (Alta. Q.B.), aff'd 42 R.F.L. (6th) 9 (Alta. C.A.); *Metcalfe v. Metcalfe*, 2006 CarswellAlta 1438 (Q.B.).)

The Award/Reasons were only 3 $^{1}/_{2}$ pages long, and the Arbitrator explained that he had been "specifically directed by counsel to limit the time expended providing the underlying analysis to [his] final determinations."

On the first issue, the Arbitrator found that Singh owed Modgill $100,000. On the second issue, the Arbitrator found that the home was beneficially owned by Singh, but that Singh owed Modgill an additional $30,000.

The Arbitrator noted specifically that the accounting records, for which Singh was responsible, were in a "woeful state." This had been acknowledged by counsel for Singh in the written submissions. It was clear that the Arbitrator was doing his best with a problematic evidentiary record.

Shortly after the Award was released, counsel for Singh requested clarity about how the amounts in the Award were calculated. The Arbitrator released a supplemental award on November 8, 2021, and noted the irony that Singh was requesting "clarity" when it was his accounting records that had been so lacking and difficult to understand. The Arbitrator provided some additional reasons but, on the main, it came down to the Arbitrator being forced to engage in some "rough justice" to render the decision.

Singh sought leave to appeal.

The Med/Arb Agreement was silent on the issue of appeal rights. Subsection 44(2) of the *Act* provides that where an arbitration agreement is silent as to appeal rights, a party "may, with the permission of the court, appeal an award to the court on a question of law." [And, very recently, the Alberta Court of Appeal determined that a party must first obtain leave in a separate application: *Esfahani v. Samimi* (2022), 73 R.F.L. (8th) 330 (Alta. C.A.) — the leave application and substantive appeal cannot be consolidated, absent consent of the parties.]

Section 44(2.1) of the *Act* then provides that leave to appeal should only be granted when:

> (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.

Singh advanced a number of grounds for appeal. In summary, they were grouped by the court into two categories:

> (a) complaints about the conduct of the arbitration; and
>
> (b) complaints about contractual interpretation.

Relying on s. 26(1) of the *Act*, Singh argued that the hearing was flawed because the parties had not had the opportunity to give *viva voce* evidence. Singh further argued that the Arbitrator had failed to exercise his jurisdiction under the *Act* to direct the parties to adduce additional evidence and/or have an oral hearing. Singh was particularly concerned about the credibility findings made against him which, he claimed, were not supported by the evidence in the record.

Subsection 26(1) of the *Act* states (and this is the same wording as in some other Arbitration Acts in Canada, such as Ontario):

> **Hearings and written proceedings**
>
> 26(1) The arbitral tribunal may conduct the arbitration on the basis of documents or may hold hearings for the presentation of evidence and for oral argument, but the tribunal shall hold a hearing if a party requests it.

However, the court determined that the Med/Arb Agreement was consistent with s. 26(1), which permits an arbitration to be conducted with only documentary evidence unless a party specifically requests an oral hearing. This law is similar (but not identical) in Ontario, where the Ontario Superior Court of Justice has determined that s. 26(1) of Ontario's *Arbitration Act, 1991*, S.O. 1991, c. 17, only requires oral argument, not oral evidence: *Optiva Inc. v. Tbaytel*, 2021 CarswellOnt 5689 (S.C.J.).

The Court of Appeal further noted that issues relating to which witnesses or what evidence the Arbitrator did or did not find to be credible are not typically questions of law. Only in "extreme cases" would decisions on credibility or reliability amount to questions of law. As this was not an extreme case, the Court of Appeal determined that this was not a question of law subject to possible appeal under s. 44 of the *Act*.

Singh also argued that the Arbitrator's interpretation of the various contracts was a question of law. But, in doing so, Singh relied on a decision decided *before* the Supreme Court of Canada decided *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (S.C.C.), where the Supreme Court held that — save for where there is a clear extricable question of law — the interpretation of a contract for the purposes of s. 44(2) of the *Arbitration Act* is a question of fact or a question of mixed fact and law, neither of which could found a successful motion for leave to appeal.

Finally, Singh argued that the Award should be set aside under s. 45 of the *Act* which provides (again, similar but not identical, to the Ontario *Act*):

> 45(1) On a party's application, the court may set aside an award on any of the following grounds:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid or has ceased to exist;
>
> (c) the award deals with a matter in dispute that the arbitration agreement does not cover or contains a decision on a matter in dispute that is beyond the scope of the agreement;
>
> (d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with the matter, was not in accordance with this Act;
>
> (e) the subject matter of the arbitration is not capable of being the subject of arbitration under Alberta law;
>
> (f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;
>
> (g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement;
>
> (h) an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;
>
> (i) the award was obtained by fraud.

Singh argued that he had been treated "manifestly unfairly" pursuant to s. 45(1)(f), and that there was an apprehension of bias under s. 45(1)(h) as he was not able to present his case or respond to the other party's case.

Singh argued that the Arbitrator failed to demonstrate an "understanding or appreciation" of the evidence that he considered important. This misapprehension constituted, according to Singh, a breach of natural justice.

The Court was clear that s. 45(1) is not a "Trojan Horse" for a factual appeal. The *Act* is clear that absent contractual appeal provisions, appeals are limited to questions of law. To allow the set aside provision to be effectively used as an appeal on the facts would void the purposeful limited appeal provisions of their meaning.

The Court of Appeal explained that "manifestly unfair" is a very high threshold. As recently set out by the Alberta Court of Appeal in *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2022 CarswellAlta 1424 (C.A.), to establish manifest unfairness a party must show that the alleged errors challenge the *fundamental validity of the process*. And any alleged unfairness must be obvious or apparent — hence the word "manifest." Where the claim of unfairness relates to the exclusion of evidence, the excluded evidence must be *crucial* to the party's case.

Singh fell well below that standard in this case. While a fundamental misapprehension of facts, or a misapprehension of fundamental facts *could* amount to a question of law and *could* constitute a denial of natural justice, that was not the case here. (As an aside, we do not understand how even a fundamental misunderstanding of facts could be a question of law.)

The parties were both represented by counsel and jointly agreed on a process. Singh was complaining about the process to which he had agreed, not because it was unfair, but because he was upset with the result.

The *Arbitration Act* and the whole idea of arbitration is based on the principle of "party autonomy." Absent clear statutory language, the *Act* should not be interpreted as prohibiting parties from choosing the process of their choice to resolve disputes. The parties agreed to a "quick and dirty" process; they wanted a quick result. And they got both.

It is clear that the arbitration process need not mirror the court process. In fact, that is one reason that parties choose arbitration in the first place — to achieve timely, cost-effective solutions with a decision-maker of their choice: *Petersoo v. Petersoo* (2019), 29 R.F.L. (8th) 309 (Ont. C.A.). For example, in has been held that "final offer selection" is a valid arbitral determination — if the parties agree to it: *Kroupis-Yanovski v. Yanovski*, 2012 CarswellOnt 11826 (S.C.J.); *Geary v. Geary* (2017), 94 R.F.L. (7th) 314 (B.C. S.C.); *McLaren v. Casey*, 2016 CarswellBC 274 (B.C. S.C.); and *Jirova v. Benincasa* (2018), 5 R.F.L. (8th) 317 (Ont. S.C.J.) (in support of Parenting Coordination).

It has also been held that the arbitral procedure should be proportional to the issues in dispute and that the process need not be consistent with the procedural safeguards of a court proceeding. In *Jung v. Jung* (2015), 72 R.F.L. (7th) 175 (Ont. S.C.J.), for example, the Arbitrator spoke to the expert privately.

Parties can, and often do, agree to a summary arbitration: *Nolin v. Ramirez*, 2019 CarswellBC 1641 (S.C.). The parties should be allowed to bargain for the process they want, given the issues in dispute. Ultimately, taking into account the process to which the parties agreed, they are entitled to a *fair* hearing; not a perfect one: *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2022 CarswellAlta 1424 (C.A.).

The Rule we Might Want is not Always the Rule We've Got

Williams v. Williams (2022), 73 R.F.L. (8th) 373 (Ont. S.C.J.) — Mandhane J.

Williams is yet another decision about whether the parties to a family law case entered into a binding settlement.

On September 3, 2021 — *before* litigation had started — the wife served a comprehensive Offer to Settle through her lawyer to resolve all issues, including the buyout of the wife's interest in the matrimonial home.

Although the husband was represented by counsel at the time, on September 13, 2021, he personally emailed the wife's lawyer that he accepted the Offer. (About an hour later, the husband's lawyer advised the wife's lawyer that she was no longer acting for the husband.)

The next day (September 14, 2021), a new lawyer contacted the wife's lawyer on behalf of the husband and advised that he was in the process of being retained. And, the following week, the husband's new lawyer reiterated that he was reviewing the settlement with the husband as quickly as possible, and requested a copy of the draft Separation Agreement incorporating the agreement that the wife's lawyer had referred to in his prior correspondence.

Instead of providing the draft Separation Agreement, however, on September 28, 2021 (i.e., only two weeks after the husband accepted the offer), the *wife's* lawyer advised the husband's new lawyer that the wife was withdrawing all previous offers, and would be starting an Application because the husband was "delaying beyond reason".

The matter proceeded to litigation, and the husband ultimately brought a motion to enforce the terms of the Offer that he had accepted on September 13, 2021. The wife responded that the correspondence between their lawyers after the Offer was accepted showed that the husband "had no intention of proceeding with the Agreement after retaining [new counsel] to represent him." In other words, the wife argued that the husband had repudiated the agreement.

Justice Mandhane started by reviewing the law of anticipatory repudiation — a very important concept for family lawyers. Anticipatory repudiation occurs where: (1) one of the parties expressly or implicitly informs the other party that they do not intend to comply with their obligations under the contract; and (2) the other party clearly and unambiguously elects to terminate the contract. As the Court of Appeal recently explained in *Glen Schnarr & Associates Inc. v. Vector (Georgetown) Limited*, 2019 CarswellOnt 20867 (C.A.):

> [29] **Anticipatory repudiation occurs when a contracting party, "by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due"**: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 585. . . .
>
> [30] However, **an anticipatory repudiation of a contract does not, in itself, terminate or discharge a contract; it depends on the election made by the non-repudiating party**: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), at p. 440; *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561 (Ont. C.A.), at para. 42. As Cronk J.A. stated in the latter decision at para. 45:
>
> > It appears to be settled law in Canada that where the innocent party to a repudiatory breach or an anticipatory repudiation wishes to be discharged from the contract, **the election to disaffirm the contract must be clearly and unequivocally communicated to the repudiating party within a reasonable time**. Communication of the election to disaffirm or terminate the contract may be accomplished directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case: McCamus, at pp. 659-61. [emphasis added.]

Furthermore, when determining whether there has been anticipatory repudiation (sometimes called "anticipatory breach of contract"), the test is "an objective one", and "the court is to ask whether a reasonable person would conclude that the breaching party no longer intends to be bound by it." (*Remedy Drug Store Co. v. Farnham*, 2015 CarswellOnt 12513 (C.A.) at para. 42).

After carefully reviewing the correspondence between the wife's lawyer and the husband's new lawyer from September 13, 2021 (when the Offer was accepted) to September 28, 2021 (when the wife purported to withdraw all Offers), Justice Mandhane concluded that the husband had ***not*** repudiated the agreement, and had ***not*** elected to accept the wife's attempt to repudiate it. Accordingly, the wife could not rely on anticipatory repudiation as a basis for resiling from the agreement.

But that, of course, was not the end of the matter (at least in Ontario), because s. 55(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, provides that a domestic contract (i.e., a family law agreement in Ontario) is unenforceable unless it is in writing, signed by the parties, and witnessed. And in this case, it does not appear that the husband's email accepting the wife's Offer met the requirements of s. 55(1).

Despite the wording of s. 55(1) of the *Family Law Act*, the Ontario Court of Appeal determined in *Geropoulos v. Geropoulos* (1982), 26 R.F.L. (2d) 225 (Ont. C.A.) that courts in Ontario have discretion to (and often do) enforce family law agreements that do not comply with s. 55(1) in certain circumstances. As Justice LaForme (as he then was) explained in *Harris v. Harris*, 1996 CarswellOnt 2794 (Gen. Div.):

> [10] The authorities following *Geropoulos* have interpreted that judgment as establishing the principles of, (a) courts encouraging settlement and, (b) that it is within the discretion of the court as to whether such a settlement is enforceable. In other words, **whether the parties will be bound by the terms of an agreement that does not conform to subsection 55(1) of the *Family Law Act* is a matter for the courts to determine and decide on a case by case basis.** While I have no doubt that there are many and varied factors that a court will consider in deciding whether a settlement is enforceable, certain minimum factors that a court will have to consider will include:
>
> 1. Were either of the parties represented by legal counsel or the beneficiary of legal advice?
>
> 2. Was either party otherwise disadvantaged at any time during the course of the negotiations?
>
> 3. Can the written material the parties prepared, or the oral representations, that are being relied upon support a *prima facie* conclusion that either constitutes a settlement agreement?
>
> 4. Does the evidence demonstrate that the parties intended that the written or oral representations or negotiations are to be binding on them?
>
> 5. Was there an intention that some final act or determination be made before the settlement was to be final and binding?
>
> 6. Does the enforcement or non-enforcement of the negotiated resolution result in an injustice to either of the parties?
>
> 7. Does enforcement encourage negotiated settlement and discourage litigation and does it support the overall purpose and intent of the principles of the *Family Law Act*? [emphasis added]

In this case, Justice Mandhane was satisfied that signing a full written agreement was ***not*** a condition precedent to a binding settlement, and that there was no good reason in this case not to hold the parties to the terms of their agreement. As a result, she made an Order enforcing the terms of the settlement.

While we generally agree with the outcome here (people should be held to their agreement attained with the benefit of independent legal advice and full disclosure), we do have one rather important caveat: while we might agree this *should be* the law — it does not appear to presently actually *be* the law. *Geropoulos*, and the vast majority of the cases that have followed it, dealt with situations where, unlike the settlement in *Williams*, the settlement in issue was reached ***after*** litigation was already underway. It was, in fact, a very important consideration for the Court of Appeal that, *once started*, counsel with apparent and ostensible authority can settle *litigation*. As the Court of Appeal explained in *Geropoulos*:

> [18] In my opinion, **the section plainly is not aimed at or intended to apply to authorized settlement agreements like the present, made with legal advice *during the pendency of court proceedings* which, to be effective, require the intervention of the court.** Such agreements derive their effect from an act of the court; their authenticity is assured by the court's supervision and control over them; and ample protection is afforded the parties to these agreements, wholly independent of the section. The court's jurisdiction to enforce settlements or refuse to do so, notwithstanding any agreement between solicitors or counsel, is well established; whether they should be enforced or not, in the final analysis, is a matter for the discretion of the court and, in litigation under the *Family Law Reform Act*, a matter that would be subject to the court's overriding jurisdiction with respect to domestic contracts: *Scherer v. Paletta*, supra; 3 Hals. (4th) 650-51, paras. 1182-83; and ss. 18(4) and 55 of the Act. [emphasis added]

The fact that litigation had started was a critical factor for the Court of Appeal in *Geropoulos*.

Although this issue was not discussed in *Williams*, the case law is still unclear about whether the *Geropoulos* exception to s. 55(1) of the *Family Law Act* also applies to settlements that predate litigation. But the weight of authority suggests not. While there are several lower court decisions that have purported to extend "the *Geropoulos* Rule" to apply to pre-litigation purported

settlements, the leading decision being Justice Perell's decision in *Pastoor v. Pastoor* (2007), 48 R.F.L. (6th) 94 (Ont. S.C.J.) — it is presently unclear whether these decisions are correct in law.

When *Pastoor* was first released in 2007, Philip Epstein expressed doubts about its correctness (see the 2007-34 (August 28, 2007) edition of *TWFL*). And, more recently, in *Lindsay v. Lindsay*, 2021 CarswellOnt 9390 (S.C.J.), aff'd 2021 CarswellOnt 15489 ((Div. Ct.)), Justice Finlayson noted that although some cases have followed *Pastoor*, the issue has still not been considered by an appellate court, and it remains unclear whether it is, in fact, good law in Ontario.

Furthermore, given the proliferation of unrepresented litigants, any consideration (or re-consideration) of the *Geropoulos* Rule must also consider whether it also applies to pre-litigation settlements where one or both parties are unrepresented.

Perhaps coming soon to an appellate court near you . . .

End of Document