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— Franks & Zalev - This Week in Family Law

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Putting Your Money Where Your Appeal Is: The Warm Blanket of Security for Costs of Appeal — and Judgment Below

Naimi v. Yunusova, 2022 CarswellBC 2529 (C.A.) — Harris J.A.

Motions for security for costs of appeal are becoming increasingly common in family law appeals.

Here, the Respondent applied for security for costs of appeal *and* the trial judgment — and she was partially successful.

The Respondent's motion was based on the Appellant's non compliance with the order of the trial judge.

The parties were married in 2008, had a child in 2011, and separated in September 2016.

The trial dealt with a number of issues. The trial judge ultimately imputed annual income of $70,000 to the Appellant for support purposes, and determined that the Respondent was entitled to $175,000 that was being held in trust, and that the Appellant owed the Respondent an additional $88,986.50.

In his Notice of Appeal, the Appellant challenged the judge's assessment of the evidence, especially as it related to the valuation and classification of the assets and debts of the parties, particularly the judge's findings about the value of certain assets in Iran. The Appellant also challenged the income the judge imputed to him.

The Appellant did not perfect his appeal on time, and he did not pay the Respondent the $88,986.50 he owed her, even though there was evidence that he had the funds available. He also failed to comply with a disclosure order by not disclosing where he held his funds in Iran and the amount of those funds.

The Appellant brought a motion to extend the time to perfect his appeal, and the Respondent brought a cross-motion for security for costs.

Turning to the question of security for costs of the appeal, s. 34 of the *Court of Appeal Act* [SBC 2021] Chapter 6 states:

> **Payment of security**
>
> 34 (1) A justice may order an appellant to pay into court security for one or more of the following:
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> (a) costs of the appeal;
>
> (b) costs of proceedings in the court appealed from, in relation to the order being appealed;
>
> (c) an amount under the order being appealed.

> 34 (2) A payment under subsection (1) must be in the amount and form determined by the justice.
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> 34 (3) This section does not apply to an appeal brought by or on behalf of the government.

Justice Harris started by considering the merits of the appeal. Many of the factual findings below that the Appellant took issue with were a result of his failure to produce necessary documents. As a result, the judge had to do the best he could with the available evidence. The findings below were also influenced by concerns about the Appellant's credibility:

> [4] The challenge is intensified by the fact that many of the transactions testified to by the respondent are not well documented, if they are documented at all. According to the respondent, money seems to have flowed regularly and freely back and forth between him and various business associates and family members.
>
> [5] The respondent's evidence about these transactions was often vague and inconsistent, adjectives that describe his evidence more generally. In this regard, I am mindful of the principles governing the assessment of credibility and reliability . . . Applying these principles, I have approached much of the respondent's evidence with caution.

As a result, Justice Harris was of the view that this was not a particularly strong appeal. Given the standard of review applicable to the errors alleged, the Appellant faced a significant challenge in establishing palpable and overriding errors.

Justice Harris was also of the view that *the Appellant* bore the burden of persuading the Court that it should *not* order security. We are not sure this is a proper distribution of the onus. As the moving party, the Respondent would ordinarily bear the onus of showing that an order for security was warranted in the circumstances. However, later in the reasons, there is reference to a "presumption in favour of granting security for costs if there is a serious question as to whether recovery may be difficult." That is a principle with which we can agree.

Ultimately, the distribution of the onus did not matter as, in the opinion of Justice Harris, this was a "clear case" for ordering security for costs of the appeal. The merits of the appeal were weak, and there was a substantial risk that if the appeal was dismissed, the Respondent would not be able to recover her costs.

Therefore, Justice Harris ordered security for costs of the appeal in the amount of $10,000 within 45 days.

The Court then turned to the Respondent's request for security for the trial judgment, which is a less common request. Here, there is no doubt that the Respondent bore the onus of showing it was "in the interests of justice" to award security for the trial judgment. Relevant considerations included whether the Respondent would be prejudiced if the order was not made, the merits of the appeal (again), and the ability of the Appellant to continue the appeal.

Although Justice Harris did not cite authority for granting security for judgment, as determined by the Ontario Court of Appeal in *Wiseau Studio, LLC v. Harper*, 2021 CarswellOnt 377 (C.A.) at para. 26, security for judgment has been granted for different reasons:

> a. Where there are no assets in the jurisdiction against which to enforce a judgment and the appeal has little merit;
>
> b. To preserve assets that would otherwise be destroyed, disposed of, or dissipated prior to the resolution of the dispute; and
>
> c. To encourage respect for the judicial process and avoid abuse of process.

And in *First Majestic Silver Corp. v. Davila*, 2014 CarswellBC 1564 (C.A.), the B.C. Court of Appeal set out the following principles governing the exercise of discretion in awarding security for judgment:

> a. The applicant bears the onus to establish that it is in the interest of justice to order posting for security of a trial judgment and/or of trial costs;

b. The applicant must show prejudice if the order is not made.

c. In determining the interests of justice, the chambers judge should consider the merits of the appeal and the effect of such an order on the ability of the appellant to continue the appeal.

Here, the court was of the view that the Respondent would be prejudiced if it did not order the Appellant to post security for costs of the judgment. The Appellant had not complied with underlying court orders, and Justice Harris was persuaded that the Appellant was avoiding his obligations. Any assets that the Appellant may control were not readily exigible to satisfy the orders against him in British Columbia. And, importantly, the prejudice arose from the Appellant's *conduct*, and was not a simple consequence of the fact of the appeal.

The questionable merit of the appeal was again a factor here, and did not assist the Appellant.

In counter-balance, the Appellant argued that he lacked resources to post security, and Justice Harris did not want to make an order that would prevent the Appellant from continuing his appeal.

Balancing the factors, the Court ordered security for the judgment below of $30,000 as partial security for the $88,986.50 owing under the trial judgment. And the appeal was stayed pending the posting of the security.

Although short, this is an important decision standing for the principle that, in appropriate cases, security for the judgment below will be ordered along with security for costs of an appeal.

Parties have the right to appeal. It is a principle of fundamental justice. But that right is not wholly unfettered. The question is when should security for the trial judgment be ordered. Here, the answer seems to be that security will be ordered where the conduct of the Appellant gives rise to doubt that the judgment below will be paid if the appeal is unsuccessful. Given this is an appeal, the Respondent has already been successful at one level of court. Therefore, in our opinion, it is reasonable that the "cost of admission" to the Court of Appeal in such circumstances might be posting security to signal that, if the appeal is not successful, the Respondent will not be left to collect costs in the wind.

Excuse Me — Are There Any Good Hotels on the Road to Ottawa Where I Might *Stay*?

Agrium v. Orbis Engineering Field Services, 2022 CarswellAlta 2005 (C.A.) — Wakeling, Crighton and Ho, JJ.A.

This is not a family law case, but again, given the very common use of arbitration in family law, this is an important decision for family lawyers to know about.

Section 7 of the Alberta *Arbitration Act*, R.S.A. 2000, c. A-43 (the "*Act*"), reads as follows:

Stay

7 (1) **If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the application of another party to the arbitration agreement, stay the proceeding.**

7(2) **The court may refuse** to stay the proceeding in only the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject matter of the dispute is not capable of being the subject of arbitration under Alberta law;

(d) the application to stay the proceeding was brought with undue delay;

(e) the matter in dispute is a proper one for default or summary judgment.

7(3)An arbitration of the matter in dispute may be commenced or continued while the application is before the court.

7(4) **If the court refuses to stay the proceeding,**

(a) no arbitration of the matter in dispute shall be commenced, and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.

7(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that

(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and

(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

7(6) **There is no appeal from the court's decision under this section.** [emphasis added]

Those living in Saskatchewan, Manitoba, Ontario, and New Brunswick will find this wording very, very familiar. But what they will *not* find familiar is the fact that, sometimes, "there is no appeal from the court's decision" means there *is* an appeal from the court's decision.

Specifically, in this case, a majority of the Alberta Court of Appeal held that parties *can*, in fact, appeal a decision from a Master to the Court of King's Bench.

The case was a standard contract dispute between Agrium (the "Appellant") and Orbis (the "Respondent"). The contract in dispute included a mandatory arbitration clause.

When the disagreement arose, rather than proceed with arbitration as seemingly required by the agreement, the Appellant started a claim in the Court of King's Bench (well, at the time it was the Court of Queen's Bench — but you get the idea). The Respondent defended the claim and moved to stay the action based on the mandatory arbitration clause. In truth, the Respondent had no choice but to defend the claim because the Appellant filed the Statement of Claim just days before the limitation period expired, and then did not serve the claim until just before the deadline to do so. Therefore, by the time the Respondent was served with the civil claim, the time to commence an arbitration had already expired.

The motion to stay went to a Master — who dismissed the motion to stay on the basis of waiver and attornment (remember — the Respondent defended the court action). The Respondent appealed — and the Appellant moved to strike the appeal based on s. 7(6) of the *Act*. (So, for those keeping track, the Appellant started a court action when not supposed to, and the Respondent appealed when not supposed to. While two "wrongs" don't make a "right" — here, two wrongs do make a bit of a mess.)

The Alberta Court of Queen's Bench allowed the appeal and struck the civil claim.

The Respondent then further appealed to the Alberta Court of Appeal arguing that the right to appeal the Master's decision was barred by s. 7(6) of the *Act*. This led to a very divided Court of Appeal.

The majority — Crighton and Ho JJ.A. — dismissed the appeal.

There is a provision in the *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31 (yes, it's the *Court of **Queen's** Bench Act*) that specifically provides for appeals from a Master to a judge of the Court of Queen's Bench. At issue, therefore, was whether (and,

if so, how) the prohibition on appeals in s. 7(6) of the *Act* could co-exist with the *Court of Queen's Bench Act* and the *Alberta Rules of Court*, Alta. Reg. 124/2010 which provide for an appeal of the decision of an application judge.

If "Court" is defined in the *Act* as the Court of Queen's Bench, according to the majority, an appeal from the Court of Queen's Bench to the Court of Appeal would be barred. However (again, according to the majority), an appeal *within* the Court of Queen's Bench (i.e. from Master to judge) would not be similarly barred. The majority found that this interpretation, "respects the constitutional limitations on the master's decision, the statutory right of appeal in the *Court of Queen's Bench Act*, and the statutory intention that arbitration matters not become bogged down in multiple levels of appeal reflected in the *Arbitration Act*." We will admit to that logic hurting our heads. It seems to us that an appeal from a Master to a judge is still an appeal.

The majority also had to contend with *Wang v. Mattamy Corporation*, 2020 CarswellOnt 16956 (Div. Ct.), where the Ontario Superior Court came to the exact opposite conclusion with identical statutory wording. The majority distinguished *Mattamy* as follows:

> [30] It is also a recognized principle of statutory interpretation that legislation is presumed to have been enacted in compliance with the Constitution: *Sullivan*, at § 16.3. For over a hundred years, **Alberta courts have characterized any deference to the decisions of provincially-appointed masters as fettering the discretionary jurisdiction of federally-appointed s 96 judges.** As a result, the decision of a master in Alberta has always been subject to review by a s 96 judge, who has always heard the appeal on a *de novo* basis. See for example, the discussions in . . . At paragraph 29 in *Van Camp* the court states:
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> > . . . A rule of law based on the constitutional foundations of the respective jurisdictions of a Judge and a Master is not subject to change through an amendment to the Rules of Court.
>
> To that we add that neither is that same rule of law subject to change through an implied amendment to a provincial statute.
>
> [31] For these reasons, and those of the chambers judge, we decline to follow the reasoning in the Ontario decision of *Wang v. Mattamy Corporation*, 2020 ONSC 7012, [2020] OJ No 5004. The courts in Ontario have not seen s 96 of the *Constitution Act, 1867* as prohibiting the province from appointing an officer of the court (a master) who may exercise some judicial functions. Thus, Ontario is more willing to give greater deference to a master's decisions, which includes permitting them to be the final word on certain types of decisions.

It would seem that, in contrast to Ontario, in Alberta, the adjudicative buck can never stop with the Master. And, therefore, despite the seemingly clear wording of s. 7(6) of the *Act*, an appeal is permitted.

Justice Wakeling dissented. His view was that a decision of a Master of the Alberta Court of Queen's Bench is — you guessed it — a decision of the Alberta Court of Queen's Bench; hard to argue with that logic. He found the wording clear, and as the procedural facts met the requirements of s.7(6), the action was properly stayed.

His Honour also disposed of the s.96 issue by noting that s. 40(1) of the *Supreme Court Act*, R.S.C., 1985, c. S-26 always provides for an application for leave to appeal a final decision of a court in a province to the Supreme Court of Canada. Therefore, the decision of a Master is not immune from appellate review.

So we now have at least two conflicting decisions in two different provinces interpreting the same wording. This sounds like a job for nine clever people in Ottawa.