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

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**Let's See How Many People We Can Upset With One Case About Arbitration**

*SZ v. JZ* (2022), 76 R.F.L. (8th) 184 (Alta. Q.B.) — Marion J.

This decision from the summer of 2022 only just came to our attention now — happens sometimes; but it deals with a very interesting issue: the discretion of an arbitrator to resign and the factors an arbitrator should consider before doing so in a family law arbitration. This case pairs nicely with *Kubecka v. Novakovic* (2022), 76 R.F.L. (8th) 370 (Ont. S.C.J.), on which we commented in the 2022-43 (November 21, 2022) edition of *TWFL: When it Comes to Arbitration, Is a "Resignation" a "Termination"*?

The parties were married in September 2002. They separated in September 2021. There were two children — one 14-year-old and an adult sibling.

The parties agreed to submit to arbitration their dispute regarding decision-making and parenting time. Their Arbitration Agreement named a specific arbitrator. The Agreement also — as do most — gave the arbitrator discretion to resign pursuant to the *Arbitration Act*, R.S.A. 2000, c. A-43 (the "*Act*").

The arbitration process went on longer than all thought it would and, during the arbitration, the arbitrator resigned, citing a busy workload and scheduling challenges.

As a result of the resignation, SZ wanted to proceed in court, claiming the same relief claimed in the arbitration. JZ, however, argued that the Court of Queen's Bench did not have jurisdiction to deal with SZ's application — because the parties had agreed to arbitration.

The question, therefore, was whether the dispute continued to be subject to arbitration or whether the resignation of the named arbitrator ended (or, in the words of the *Act*, "terminated") the arbitration.

Recall that in *Kubecka v. Novakovic* (2022), 76 R.F.L. (8th) 370 (Ont. S.C.J.), the Court determined that the resignation of the arbitrator constituted a "termination" of the arbitrator's mandate under the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17 — but not a termination of the arbitration process itself — such that the Court could appoint a new arbitrator, in accordance with the parties' Arbitration Agreement. At the time, we questioned that decision (although, in fairness we also noted it was not clear

whether the Arbitration Agreement in that case specified that the arbitration was to be conducted "only by a named arbitrator" pursuant to s. 16(5) of the Ontario *Act*).

The Court reaches the opposite conclusion in *SZ v. JZ*, where Justice Marion concludes that the arbitration process itself had been terminated by the resignation of the arbitrator. Therefore, the Court had jurisdiction to consider the application.

However, Justice Marion did not make this decision without commenting on an arbitrator's duty. As the resignation of an arbitrator can wreak all sorts of havoc in the dispute resolution process by causing wasted costs and delay — and sometimes injustice to an "innocent" party where one side has made the arbitrator's mandate particularly "challenging" — an arbitrator must exercise the discretion to resign reasonably and in good faith, and in accordance with the principles of good faith in contract performance as set out in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 CarswellBC 265 (S.C.C.).

When considering whether or not to resign, an arbitrator should consider the following factors:

[78] Voluntary arbitrator resignations, even where permitted by the arbitration agreement, can be disruptive. They inevitably will result in delay and thrown-away costs, and can lead to jurisdictional confusion. **This is exacerbated in a high-conflict family dispute involving the best interests of children.** Even if an arbitrator has the discretion under the arbitration agreement to voluntarily resign, absent circumstances that require resignation, **he or she should be circumspect and cautious in doing so when families rely on him or her. An arbitrator must exercise any discretion to resign reasonably and in good faith as contemplated by the Supreme Court of Canada in *Wastech Services Ltd. v. Greater Vancouver Sewage and Drainage District*, 2021 SCC 7, including in a manner that is consistent with the purposes for which the discretion was provided in the contract.**

[79] In deciding whether to exercise a discretion to resign, an arbitrator should consider relevant factors, including **whether resignation will undermine the underpinning purposes of arbitration agreements in the first place**, namely expeditious, private, economical dispute resolution with allowance for more specialized expertise: *ENMAX Energy Corporation v. TransAlta Generation*, 2022 ABCA 206 at paras 4 and 24. As a corollary to this, the arbitrator should consider **whether resignation will cause unfairness, prejudice or harm to the parties.** The arbitrator should also consider whether there are any matters that have arisen since his or her appointment that would preclude the arbitrator from continuing on, such as an emerging conflict of interest, lack of impartiality, bias, or a lack of qualifications the parties have agreed are necessary. **This is not intended to be an exhaustive list of factors.**

[80] In a family dispute, the arbitrator **should also consider whether his or her resignation is in the best interests of any children** involved in or affected by the dispute. It may be that **in some situations an arbitrator will decide he or she must soldier on at his or own personal inconvenience or hardship — this may be one of the burdens of accepting an appointment and compensation as arbitrator.** [emphasis added]

To this list of considerations we would add whether or not the Arbitration Agreement has a provision to replace an arbitrator (so that the parties are not forced to start all over again in court).

But allow us to emphasize the last point made by Justice Marion: in some situations, an arbitrator will decide they must "soldier on" at their own personal inconvenience/hardship — and this may be one of the burdens of accepting the appointment and compensation.

At the risk of hate mail from arbitrators across the country, Justice Marion is unquestionably right. Those that arbitrate have accepted a mandate — and we are well paid for it. Save for exceptional circumstances, arbitrators should not resign when a file becomes difficult or challenging. It is not fair to the parties and, quite often, it is particularly unfair to one of the parties in circumstances when the other is specifically *trying* to get out of the arbitration process, as sometimes happens.

This is especially the case with mediation/arbitration. For an arbitrator to resign after mediation, after being paid, means the appointed mediator/arbitrator has only done half a job. Acting as an arbitrator is — and should be expected to be — hard

work. Even efficient hearings can take significant amounts of time, and to write a well-reasoned and coherent Award can be challenging. It's just not right for an arbitrator to resign should a file become difficult.

That said, there are, of course, situations (as noted by Justice Marion) where it is entirely proper for an arbitrator to consider resigning. People get sick. Unforeseen conflicts arise. And, sometimes, in very challenging cases with very difficult people, an arbitrator simply lacks the necessary "judicial toolkit" to bring the matter to an end.

To this we would also add the issue of payment. As noted, arbitration can be a challenge. If parties are not paying for the service, the service need not be provided. This can become a bit "sticky" when one party is not paying their share in a concerted effort to get out of arbitration, but the law is reasonably clear that where one party refuses to pay their share, the opposing party may elect to pay the full account to continue (and claim the extra amount paid as part of costs) or to terminate the arbitration: *Resin Systems Inc. v. Industrial Service & Machine Inc.*, 2008 CarswellAlta 305 (C.A.). Alternatively, the court can order a "non-paying" party to pay their share of the arbitrator's fees unless and until the arbitrator is removed (or until the appointment expires): *Seed v. Seed* (2008), 57 R.F.L. (6th) 158 (Ont. S.C.J.); *Santen v. Tarasenko*, 2009 CarswellOnt 896 (S.C.J.).

In *SZ v. JZ*, Justice Marion found no evidence the arbitrator was acting in bad faith in resigning. The arbitrator resigned because he did not want to get in the way of the matter proceeding in a timely fashion.

In contrast to *Kubecka v. Novakovic* (2022), 76 R.F.L. (8th) 370 (Ont. S.C.J.), here, Justice Marion found that because the arbitrator was *specifically* named in the Arbitration Agreement, the arbitration terminated upon the arbitrator's resignation, clearing the way for the matter to proceed in court. However, in *SZ v. JZ*, the arbitrator was no more "specifically named" than the arbitrator seems to have been in *Kubecka* (assuming the Arbitration Agreement in *Kubecka* was somewhat standard in this regard).

Similar to the Ontario *Act*, the Alberta *Act* provides that an arbitration is terminated when the arbitrator's mandate is terminated, if the arbitration agreement provides that the arbitration "is to be conducted *only* by that arbitrator." (The provisions with respect to termination and appointing a new arbitrator are essentially identical.)

As noted by Justice Marion, there are no cases that interpret the reference to "only" by "that arbitrator" or "a named arbitrator" — and there may be conflicting authority as to what "only" means in this situation. Some cases suggest that this only applies where the parties are "wed" to a particular arbitrator, or where the Arbitration Agreement expressly states that no substitute arbitrator could ever be appointed: *Murphy v. Wise*, 2010 CarswellOnt 6964 (S.C.J. [Commercial List]) at paras. 38-39; *Hodder v. Eouanzoui*, 2020 CarswellOnt 19112 (S.C.J.) at para. 57; *Kaplan v. Kaplan* (2015), 57 R.F.L. (7th) 354 (Ont. S.C.J.) at para. 89. Other cases suggest that it is enough that the agreement to refer the dispute was to a named arbitrator: *Litz v. Litz*, 1998 CarswellMan 261 (C.A.).

Despite suggestions to the contrary in Ontario, we find ourselves agreeing with Justice Marion. One of the reasons people agree to arbitrate — especially in the area of family law — is the ability to specifically select the decision-maker. It is a form of statutorily permitted judge shopping. And there is absolutely nothing wrong with it — that is, in having a dispute decided by someone in whom the litigants repose trust.

But there is a world of difference between "agreeing to arbitrate with Mr. Smith" and "agreeing to arbitrate." If Mr. Smith is specifically named as the arbitrator, without a specific substitute, or mode of replacement specifically identified in the Arbitration Agreement, that should be the end of it. What more is needed to show that the parties meant for the arbitration to be conducted only by Mr. Smith? It is otherwise a trap for the unwary.

As the Manitoba Court of Appeal determined in *Litz v. Litz*, 1998 CarswellMan 261 (C.A.), there is a:

[11] . . . distinction between an agreement to refer a dispute to arbitration, whoever the arbitrator may be, and an agreement to refer a dispute to a specific person as the arbitrator.

When the parties name Mr. Smith as the arbitrator — he is the only arbitrator the parties want — again, excepting specific provisions in the Arbitration Agreement for the appointing of a substitute arbitrator. Appointing "Mr. Smith" is different than appointing "an arbitrator from Arbitration Chambers."

In *SZ v. JZ* the Arbitration Agreement provided:

- In the preamble, that the parties "have agreed to retain the Arbitrator to arbitrate their submitted issues and the Arbitrator has agreed to accept such appointment and to arbitrate the unresolved issues";
- At clause 11, that the parties "hereby appoint [the named arbitrator]" as the sole Arbitrator to hear and determine the issues in dispute; [note that the mention of "sole arbitrator" is most like a reference to the fact that the arbitration is to be conducted by one arbitrator as opposed to a panel]
- At clause 22, in the event that the parties are unable to arrive at an agreement through the mediation process, the parties agree that the resolution of the dispute shall be determined by binding arbitration. The named Arbitrator is appointed as sole arbitrator pursuant to the *Arbitration Act* and shall render a binding decision regarding the issues; and
- The Arbitrator had the discretion to resign and to unilaterally terminate the arbitration process entirely. The Arbitration Agreement did not provide for the appointment of any new arbitrators in this event.

That was enough for Justice Marion. And it is enough for us, too. While this interpretation certainly means that more matters that were once in arbitration may end up in court, it is, respectfully, what most people anticipate when they appoint an arbitrator.

And there you have it. In one short comment, we've managed to upset both arbitrators and judges. Well, who said we were here to make friends.

### **This Public Service Message Brought to You by the Paramountcy Doctrine, the Division of Powers and Section 15.2 of the *Divorce Act***

*Joudrey v. Joudrey*, 2023 CarswellOnt 2625 (S.C.J.) — James J.

This short case serves as a reminder that there is sometimes more than one way to skin the support cat.

The parties began living together in 2001. They were married in 2016 and separated in March 2020. The husband was a member of the Canadian Armed Forces and the couple relocated to the Picture Province — New Brunswick — in 2016. They were living in New Brunswick when they separated.

In September 2020, the wife started an application in New Brunswick under the *Family Law Act*, S.N.B. 2020, c. 23 (the "*Family Law Act*") — she did *not* claim any relief under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) (the "*Divorce Act*"). That proceeding resolved with a final consent order (November 5, 2020) that included a mutual waiver of support (the "New Brunswick Order"). (This is what is reported in the case — but as a court cannot order a release of support, we presume the parties agreed to a declaration that neither was entitled to support or something of that nature.)

After separation, the wife moved to Ontario and the husband was posted to Beautiful British Columbia.

In Ontario, the wife commenced an Application and sought to set aside the New Brunswick Order on the basis of fraud and misrepresentation. The wife claimed that she was induced to agree to the New Brunswick Order by the husband's false representations that he was about to retire, when he did not.

The husband responded to the wife's Application and sought a declaration that the Ontario Superior Court of Justice did not have jurisdiction to set aside the New Brunswick Order.

Remember — the New Brunswick Order was issued under the New Brunswick *Family Law Act*. Whereas Parliament provided a mechanism in the *Divorce Act* for support orders issued under the *Divorce Act* in one province to be varied and enforced by a court in a different province (sections 18 to 20), support orders issued under provincial legislation are only variable under the *Interjurisdictional Support Orders Act, 2002*. Other provinces have corresponding legislation. A court in one province does not have the jurisdiction to simply vary or set aside a support order under provincial legislation from another province.

The wife argued that when the husband responded to her Ontario claim he had attorned to Ontario jurisdiction. However, as noted by Justice James, and as often forgotten by many, *attornment does not create jurisdiction* — the notion of attornment only allows a court *in personam* jurisdiction over a respondent where the court has the jurisdiction to do what is asked of it. Here, the Ontario court did not have the jurisdiction to do what was asked of it — and jurisdiction cannot be conferred by consent: *Rothgiesser v. Rothgiesser (2000), 2 R.F.L. (5th) 266 (Ont. C.A.)*.

Justice James goes on to comment that the wife was basically looking for a second kick-at-the-can, based on new information but that "outside the specific statutory mechanisms that address interjurisdictional support orders, an Ontario court cannot help the applicant."

But that is not strictly accurate.

Remember, the parties were not yet divorced, and given that the wife had been living in Ontario for more than a year, the Ontario Superior Court of Justice would have jurisdiction in a divorce proceeding in which spousal support was claimed by way of corollary relief.

And what of the fact that there was already an Order of the New Brunswick Court of Queen's Bench (as it was) dealing with support? Let's remember section 15.2(4) of the *Divorce Act*:

#### **Factors**

(4) In making an order under subsection (1) [spousal support orders] or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) **any order**, agreement or arrangement relating to support of either spouse.

This is no different than the ability of a Court to take a previous support release in an agreement into account when adjudicating support — à la *Miglin v. Miglin (2003), 34 R.F.L. (5th) 255 (S.C.C.)*. And one would think that if the husband had in fact misrepresented his intention to retire, the wife might have a reasonable argument.

Therefore, should the wife claim spousal support as corollary relief as part of a Divorce Application, although the New Brunswick Order cannot be set aside, the Ontario Court Superior Court of Justice will be able to consider her application for spousal support.

#### **From the Studio that Brought You Such Litigation as "My Coffee Was Served Too Hot" and "My Sub Is Not a Full Foot Long" — Comes Our Next Thriller: "The Trailer Made me Sad"**

*Conor Woulfe et al v. Universal City Studios LLC et al, 2022 WL 18216089, United States District Court for Central District of California — Judge Wilson*

This is not a family case. And unlike the other "non-family" cases we sometimes report on — this case will never be useful to you. It is solely for your amusement. But it might make you pay more attention to movie trailers and previews.

It has happened to everyone. You see a movie trailer and think, "Hmmm . . . that looks like it might be fun." Perhaps several months later, we watch the movie, and one of the scenes we remember from the preview was not actually in the movie. Few care. Fewer give it a second thought. And certainly no one loses any sleep over it. Or do they?

The plaintiffs saw a preview for the movie "Yesterday" — good movie, by the way. The premise is that only one person on earth has any knowledge or recollection of the Beatles or their music. The trailer included a scene featuring Ana de Armas (the actor) which apparently convinced them to spend \$3.99 to rent the movie on Amazon's streaming service. When they watched the movie, to their shock and horror, Ms de Armas was not in the movie. As it turns out, her scenes ended up on the editing room floor, but the trailers had been created before the final edits had been made to the movie.

The crest-fallen plaintiffs sought to certify a class action against Universal Studios (the distributor) claiming misleading advertising, claiming some \$5 million in damages on behalf of the disheartened class.

Universal tried to have the claim dismissed, arguing that a movie trailer is an artistic, expressive work that tells a story with "non-commercial speech."

The Court rejected this argument. While the creation of a movie trailer surely involves some creativity, "at its core, a trailer is an advertisement designed to sell a movie by providing consumers with a preview."

The studio also argued that to allow the case to proceed would open the floodgates anytime there was a mis-match between the trailer and the film itself. But the Court drew a distinction between subjective and objective disappointments — and this was an objective disappointment because Ms de Armas was not in the actual movie.

The case survived summary dismissal. We can't wait to see the sequel.

The plaintiff further alleged that, as a result of its deception, Universal had been *unjustly enriched* by receiving payments from the plaintiffs (and the Class) in return for providing a movie product that does not include the actress Ana de Armas as advertised. Unjust enrichment? Maybe this is a family law case after all.

See you at the movies.