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— Franks & Zalev - This Week in Family Law

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They Always Hide the Good Stuff in the Footnotes

Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc. et al., 2023 CarswellOnt 3687 (S.C.J. [Commercial List]) — Steele J.

Every few decades a case comes along that is a paradigm shift; a truly transformative case that changes or impacts the law as never before. Think *Hryniak v. Mauldin*, 2014 CarswellOnt 640 (S.C.C.).

This is not one of those cases.

One would not know that from the amount of chatter it has generated, but in our respectful view it is much ado about the obvious.

In *Aroma*, Justice Steele of the Ontario Superior Court of Justice set aside two arbitral awards on the basis that there was a reasonable apprehension of bias. This determination was based on the fact that the arbitrator accepted a new arbitration mandate on an unrelated file with one of the same counsel part-way through the Aroma arbitration — and the fact of the new mandate was not "disclosed" until it was accidentally discovered after the Aroma award was delivered.

Therefore, many have suggested that *Aroma* stands for the proposition that a failure to disclose past and current engagements, including engagements accepted by an arbitrator while in the midst of an existing arbitration, could lead to a finding of a reasonable apprehension of bias.

But, respectfully, we suggest that this overstates what happened in this case. We suggest that the result is entirely fact specific and that the same result, absent specific facts, would not likely be the result in a family arbitration. And here's why.

The Aroma case was about the alleged wrongful termination of a Franchise Agreement. Pursuant to that Franchise Agreement, such disputes were to be arbitrated — specifically by someone with "**no prior social, business or professional relationship with either party.**" This requirement was clearly important to the parties. Not only was it specifically part of the Franchise Agreement, but *the parties rejected three potential arbitrators* on account of this clause before selecting one that had never previously acted as a mediator or arbitrator for either party or their lawyers.

The arbitration took place over two years, after which the arbitrator determined that the Franchise Agreement had been wrongfully terminated and awarded damages of \$10 million.

When the arbitrator delivered the final award to counsel by email on January 12, 2022, the arbitrator accidentally copied another lawyer from the respondent's law firm that had not been involved in the arbitration. After further back-and-forth and correspondence, it turned out that the respondent's law firm had engaged the arbitrator for another arbitration 17 months after

the Aroma arbitration began. (The lawyer that was accidentally copied was counsel on that second arbitration.) The second arbitration involved different parties but the same senior counsel.

As a result, the applicants moved to set aside the arbitration award based on a reasonable apprehension of bias.

The Court first specifically noted the importance to the parties of the neutrality of the arbitrator:

[89] It comes down to context. As set out in *Dufferin [v. Morrison Hershfield]*, 2022 CarswellOnt 8095 (S.C.J.) at para. 112, citing *Telesat [Canada v. Boeing Satellite Systems International Inc.]*, 2010 CarswellOnt 10550 (S.C.J.): "when considering bias, whether actual or the appearance of bias, **context matters.**" A significant factor in this matter is the emphasis that was placed, in the pre-appointment correspondence, on **whether there had been any prior dealings with the chosen arbitrator by the parties, their lawyers or law firms. As set out in detail above, it was very important to both parties, but perhaps even more important to the applicants, who are not based in this country, that the selected arbitrator not have a professional or personal relationship with either party or their counsel.** After considerable correspondence and at least three proposed and rejected potential arbitrators, the parties ultimately selected an arbitrator that had not acted as a mediator or arbitrator previously for either party or their lawyers. **The "neutral" status of the arbitrator was clearly important to the parties in selecting the arbitrator. It is not as though it would be less important while the arbitration was extant.** [*emphasis added*]

The importance of this factor to the parties cannot be overstated. The parties specifically bargained for an arbitrator that had no prior professional or personal relationship with either party or their counsel.

The Court then considered the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines"). The Court accepted that even where not expressly adopted by the parties, the Guidelines are recognized as authoritative as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases.

The IBA Guidelines set out colour-coded lists of specific situations indicating whether they required disclosure or disqualification of an arbitrator. Notably, this includes potentially disclosing appointments of the arbitrator made by the same party or the same counsel while a case is ongoing. The applicants argued that, in these circumstances, the arbitrator should have disclosed the second arbitration mandate.

Within those Guidelines, the "Orange List" is a non-exhaustive list of specific situations that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. Therefore, the "Orange List" reflects situations that would suggest the arbitrator has a duty to disclose. Paragraph 3.1.3 on the "Orange List" calls for disclosure in the following situation:

3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

However, footnote 5 to paragraph 3.1.3 states:

It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialised pool of individuals. **If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice.** [*emphasis added*]

Given the relatively small arbitration bars in most provinces and territories, we would add family law arbitration to this list of areas where it is the practice to draw arbitrators from a smaller or specialised pool of individuals. To suggest that — absence a specific requirement to do so at the behest of the parties — an arbitrator dealing with a family matter must disclose the fact that s/he had previously arbitrated for counsel involved in a case, means that such disclosure is likely going to have to be made in most cases. Counsel that arbitrate matters with clients know this to be true, and it is up to them to educate their clients.

Ultimately, one of the advantages of arbitration is that you get to pick your arbitrator; so don't pick an arbitrator in whom you do not repose the trust and confidence to adjudicate fairly.

If the use of arbitrators on multiple family law matters amounted to a reasonable apprehension of bias, then the pool of available family law arbitrators would be severely restricted. Fortunately, Justice Steele also emphasized the presumption of impartiality on the part of an arbitrator is high — and the fact that an arbitrator accepts another unrelated arbitration from the same law firm does not in and of itself give rise to a reasonable apprehension of bias.

In *Aroma*, it was not difficult for Justice Steele to find a reasonable apprehension of bias:

- The importance to the party of the lack of a previous relationship with the parties or counsel was clear.
- The second mandate was not openly disclosed. Rather, it appears to have been hidden for over a year while the first arbitration was proceeding.
- The second mandate was only inadvertently discovered.

In all the circumstances, as determined by Justice Steele, a reasonable person would lose confidence in the fairness of the proceeding and, in particular, the equal treatment of the parties. That is, a fair-minded and informed person, considering the facts and circumstances of this matter, would conclude that circumstances existed that gave rise to a reasonable apprehension of bias.

Considering the importance to the parties of an arbitrator that had no prior involvement with either party or counsel, this was a situation the Court could not permit to stand. The award was set aside. Places everyone — places. Two-year-long arbitration hearing: Take 2.

"Hey Siri — Please Delete Any Incriminating Text Messages"

D(SJ) v. P(RD), 2023 CarswellAlta 395 (K.B.) — Leonard J.

We have written about a number of recent cases dealing with the admissibility of surreptitious video and audio *recordings* in family law cases, including Justice Kurz's decision in *Van Ruyven v. Van Ruyven* (2021), 62 R.F.L. (8th) 451 (Ont. S.C.J.) and Justice Turcotte's decision in *Heimlick v. Longley* (2022), 71 R.F.L. (8th) 454 (Sask. Q.B.) (see the 2022-16 (May 2, 2022) and 2022-21 (June 13, 2022) editions of *TWFL*).

But *D(SJ)* is the first family law case in recent memory that deals with the admissibility of surreptitiously obtained *text messages*. [There are some criminal cases that deal with such evidence: *R. v. Pelucco*, 2015 CarswellBC 2386 (C.A.); *R. v. Marakah*, 2017 CarswellOnt 19341 (S.C.C.), rev'g, 2016 CarswellOnt 10861 (C.A.); and *R. v. Jones*, 2016 CarswellOnt 10858 (C.A.), aff'd, 2017 CarswellOnt 19343 (S.C.C.) (suggesting there is a reasonable expectation of privacy in text messages even once sent); *R. v. Bridgman*, 2017 CarswellOnt 20155 (C.A.); and *R. v. Mills*, 2019 CarswellNfld 161 (S.C.C.) (suggesting there is no reasonable expectation of privacy in social media chats).]

The parties were in a common law relationship for more than 20 years before they separated in 2018. They had two children together, but never married.

After they separated, the father retained possession of the parties' truck. Although the loan for the vehicle was in the parties' joint names, the record was unclear as to whether the truck was actually jointly owned or owned solely by the father.

The parties did not service the truck loan, and the bank took steps to repossess it. In early 2021, a bailiff contacted the mother, informed her that he would be seizing the truck the next day from the father's niece's home (where else would one keep a truck?), and asked her to meet him at the niece's home so he could serve her with various documents.

When the mother arrived at the niece's home, she noticed there were a number of personal items in the vehicle, including the father's old cell phone. When the bailiff advised the mother that he intended to dispose of the contents of the vehicle, she used her key to enter the vehicle and remove the personal items, including the father's phone.

Meanwhile . . . the father's niece saw the mother and the bailiff outside her house. She contacted the father, and he immediately started emailing the mother to tell her not to remove *anything* from the truck. The mother admitted she received the father's emails. She claimed she had already removed the contents from the truck by the time she received them, but this seems to be a distinction without a difference, as the mother clearly knew that the father did not consent to her taking his belongings, including his old phone.

After the mother left the father's niece's home, she used a computer program called "Decipher Tools" to download the father's text messages as a PDF. (As an aside, while we are not familiar with this particular program, this type of program is an invaluable tool for family law lawyers, because instead of having your client send you multiple screenshots of text messages, the client can simply download the complete text message chain in chronological order as a PDF. This will make it much easier for you, and the judge if you want to rely on the messages in court, to review them. If you have not already tried one of these programs, you should.)

The mother wanted to rely on some of the text messages she obtained from the father's phone as they apparently showed he had made arrangements with his employer to artificially reduce his income for support purposes, and that he intentionally let the bank foreclose on the family home — the proverbial "smoking text messages."

The father argued that the text messages should be excluded because of how they were obtained.

To decide the issue, Justice Leonard started by reviewing the Supreme Court of Canada's recent decision in *R. v. Schneider*, 2022 CarswellBC 2747 (S.C.C.), where the Court summarized the basic principles that apply when determining whether a particular piece of evidence is admissible, including the following:

- "Evidence that is relevant to an issue at trial is admissible, as long as it is not subject to an exclusionary rule and the trial judge does not exercise their discretion to exclude it[.]" [para. 36]
- When deciding whether to admit a piece of evidence, "[j]udges must consider: (a) whether the evidence is relevant; (b) whether it is subject to an exclusionary rule; and (c) whether to exercise their discretion to exclude the evidence." [para. 36]

Relevance

- To determine relevance, a judge must ask whether the evidence tends to increase or decrease the probability of a fact at issue[.] [para. 39]
- "Judges, acting in their gatekeeping role, are to evaluate relevance 'as a matter of logic and human experience'[.]" [para. 40]
- "The evidence does not need to 'firmly establish . . . the truth or falsity of a fact in issue' . . . , although the evidence may be too speculative or equivocal to be relevant[.]" [para. 40]
- "The threshold for relevance is low and judges can admit evidence that has modest probative value[.]" [para. 40]
- "A judge's consideration of relevance 'does not involve considerations of sufficiency of probative value' and 'admissibility . . . must not be confused with weight'[.]" [para. 40]
- "Concepts like ultimate reliability, believability, and probative weight have no place when deciding relevance." [para. 40]

Exclusionary Rules

- "Evidence that is relevant is ordinarily admissible, subject to various exclusionary rules." [para. 46]

Judicial Discretion To Exclude Evidence

- "... judges must determine whether they should exercise their discretion to exclude evidence by balancing probative value against prejudicial effect." [para. 59]
- "Probative value relates to the degree of relevance to trial issues and the strength of inference that can be drawn from evidence[.]" [para. 60]
- "Prejudicial effect relates to the likelihood that a jury [or trier-of-fact] will misuse the evidence[.]" [para. 60]
- "Weighing probative value against prejudicial effect has been referred to as a 'cost benefit analysis'[" [para. 60]

There was no real question in *D(SJ)*, that the evidence in question was *relevant* to the support issues. As Justice Leonard explained in her decision, "[a]n accurate determination of the parties' income is crucial to the determination of the amount of spousal and child support owed."

With respect to the other two parts of the test, while the father did not raise any specific exclusionary rules, he did argue that the court should exclude the text messages because they had been obtained in violation of his privacy rights and because their prejudicial effect outweighed their probative value.

Justice Leonard was clearly concerned about the effect the admission of surreptitiously obtained text messages could have on the administration of justice, and about whether admitting them in this case might "encourage these litigants and others to engage in odious behaviour in search of a litigation advantage." However, after making it clear that she was not condoning the mother's behaviour, Justice Leonard ultimately concluded that despite the mother's improper conduct, the probative value of the text messages, and risk that the mother and children would be deprived of appropriate support if they were excluded, persuaded her to permit the mother to rely on the text messages at trial:

[19] However, **given the circumstances, I am of the view that [the mother's] actions do not rise to the level of being "highly offensive to a reasonable person," and therefore do not cry out for judicial intervention.** [The privacy tort cases of] *Shillington* [2021 ABQB 739] and *Jones* [2012 ONCA 32], were both cases where the privacy breaches at issue were the result of abuses of power on the part of the Defendants. The same cannot be said in this case. [The father] deactivated the Cell Phone after he obtained a new phone. **He left the Cell Phone in a truck that was being repossessed by bailiffs. [The mother] was jointly responsible with [the father] for the truck loan. [The mother] had a key to the truck and was present at the location of the truck to be served with paperwork by the bailiff. There is no evidence that [the mother] was aware that the Cell Phone was in the truck before she arrived on the scene,** nor is there any evidence that the bailiff at the scene or [the mother] were aware that [the father] had arranged with the bailiff's office to pick up his belongings two weeks later. **In the circumstances, I conclude that the text messages are not inadmissible because of the violation of [the father's] privacy interest.**

.....

[40] **I acknowledge that admitting these text messages may give rise to concerns about the administration of justice. Moreover, I am particularly concerned that this decision may encourage these litigants and others to engage in odious behaviour in search of a litigation advantage.** I do not condone [the mother] taking the phone and accessing its contents. [The father] did not waive his privacy interest in these text messages. **However, the messages may shed light on an issue that is notoriously difficult to resolve. That probative value outweighs [the mother's] conduct in this case because of the unique circumstances that led to [the mother] being in possession of the Cell Phone.** [emphasis added]

As the father no longer had access to the text messages on his old phone, Justice Leonard also ordered the mother to give him a complete copy of all of the text messages she had downloaded, and allowed him direct access to the phone so he could verify that the mother had not altered or omitted any relevant messages.

So, it seems that, with this start, the question of admissibility of surreptitious text messages may be headed down the same path as that for surreptitious audio or video evidence: courts condemn the "odious" practice; courts say it should not happen; and then the evidence is allowed in if it is highly probative. So we ask this: Why the charade? Why not just default to the most basic rules of evidence: relevant evidence is admissible unless the probative value is outweighed by its prejudicial effect; and the method of obtaining the evidence can be considered at the "prejudicial effect" stage?

Applying that standard, we certainly understand why Justice Leonard admitted the evidence in this case. The evidence in question was directly relevant to the key issue of the father's true income; the evidence was highly probative; and the manner in which the evidence was obtained was not terribly offensive — certainly not as egregious as, for example, breaking into the father's house or hacking into his phone or computer. While we keep the sentiments of Justice Kurz from *Van Ruyven v. Van Ruyven* (2021), 62 R.F.L. (8th) 451 (Ont. S.C.J.) in mind: "routinely allowing our courts to reward a party's attempt to secretly spy on the other by admitting the fruits of that conduct into evidence contributes to the corrosiveness of matrimonial litigation;" we note that the conduct in question here does not amount to one spouse "spying" on the other. Rather, the conduct here amounts to using the father's own texts to shed light on his own ill-conceived plan.

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