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

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**Contents**



## Browne There . . . Dunn That . . .

*De Longte v. De Longte*, 2023 CarswellOnt 15063 (S.C.J.) — Fowler Byrne J.

*. . . if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.*

Lord Herschell, L.C. — *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.)

While we've all (hopefully) heard of the "rule" in *Browne v. Dunn*, it seems that it continues to be misunderstood, misapplied, and sometimes (unfortunately) forgotten. This can be a real problem because, while not often the case (and while exceedingly rare in a civil case), a breach of the Rule in *Browne v. Dunn* can be serious enough to warrant a new trial: *R. v. Abdulle*, 2016 CarswellAlta 14 (C.A.).

Fortunately, Justice Fowler Byrne's recent decision in *De Longte v. De Longte* provides an excellent opportunity for a quick refresher.

One of the main issues in *De Longte* was whether, and to what extent, the Applicant wife's corporations had unreported cash sales (with the Respondent husband claiming they were more extensive than the wife was willing to admit).

As part of her case, the wife and her bookkeeper gave evidence about the corporations, and their knowledge of any unreported cash sales. They were also cross-examined on their evidence.

After the wife closed her case, the husband opened his. During his examination in chief, the husband tried to give evidence about various events that, if accepted, would support his allegations that the wife had not disclosed the full extent of unreported cash sales. The problem, however, was that the husband had not put these specific allegations to the wife or to her bookkeeper when they were each cross-examined. The wife objected, and alleged that the husband's evidence violated the rule in *Browne v. Dunn*. Was she right?

This resulted in a mid-trial ruling from Justice Fowler Byrne.

Her Honour started her analysis by providing a succinct summary of the rule in *Browne v. Dunn*, and confirming (despite some vague suggestions to the contrary) that the rule absolutely applies in the family law context:

> [9] While more readily identified in criminal proceeding, **the rule in *Browne v. Dunn* is equally applicable to family law trials**. Some examples of its application can be found in *Liu v. Huang*, 2020 ONCA 450 at para. 13-25 and *Alajalian v. Alajajian*, 2019 ONSC 4678 at para. 17.
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> [10] The rule can be summarized as follows. **If a party intends to impeach a witness called by the opposite party, the party who seeks to impeach must give the witness an opportunity, while the witness is in the witness box, to provide any explanation the witness may have for the contradictory evidence**: *Browne v. Dunn*, 1893 CanLII 65, at pp. 70-71; *R. v. Quansah*, 2015 ONCA 237 at para. 75.
>
> [11] **The rule in *Browne v. Dunn* is a rule that ensures trial fairness.** It ensures fairness to the witness whose credibility is attacked, fairness to the party whose witness is impeached, and fairness to the trier of fact. With respect to the last principle, it ensures that the trier of fact will not be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict: *Quansah*, para. 77. [**emphasis** added]

To further elaborate, as stated by Justice Watt in *R. v. Quansah*, 2015 CarswellOnt 4940 (C.A.) at para. 77, the rule is rooted in the following considerations of fairness:

> i. Fairness to the witness whose credibility is attacked:
>
> The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: *R. v. Dexter*, 2013 ONCA 744, 313 O.A.C. 226, at para. 17; *Browne v. Dunn*, at pp. 70
>
> ii. Fairness to the party whose witness is impeached:
>
> The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and
>
> iii. Fairness to the trier of fact:
>
> Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.

In other words, you can't call evidence to try to prove a witness is lying ("attack their credibility") without giving that witness a chance to tell their side of the story while they are in the witness box. That being said, the rule of *Browne v. Dunn* is not meant to be applied over-zealously. It does not require the cross-examiner to, as the Ontario Court of Appeal colourfully put it in *R. v. Verney*, 1993 CarswellOnt 1157 (C.A.) and *R. v. Clarke*, 2013 CarswellOnt 263 (C.A.), "slog through a witness's evidence-in-chief putting him on notice of every detail the defence does not accept". Rather, "[o]nly the nature of the proposed contradictory evidence and its significant aspects need be put to the witness." [See also *R. v. Drydgen*, 2013 CarswellBC 1546 (C.A.); and *R. v. G. (K.W.)*, 2014 CarswellAlta 477 (C.A.)]

The rule also does not apply to previous contradictory evidence from the very person being cross-examined: *Yan v. Nadarajah*, 2015 CarswellOnt 18692 (S.C.J.); *Curley v. Taafe*, 2019 CarswellOnt 6859 (C.A.) — as there could not, in that instance, be claims of "unfair surprise." For the same reason, it does not apply to a witness's own documents or affidavits: *Curley v. Taafe*, 2019 CarswellOnt 6859 (C.A.); *Yan v. Nadarajah*, 2017 CarswellOnt 3216 (C.A.). If a witness clearly knows the evidence against him, there is no need for additional notice: *R. v. W. (M.L.)*, 1995 CarswellOnt 1771 (C.A.).

In *De Longte*, the wife had notice of ***some*** of the evidence the husband would be raising to support his claims of unreported cash income, because it was raised in the affidavits that the husband had filed as evidence-in-chief for the trial from some of his witnesses. As the wife had notice of this particular evidence and had been able to address it as part of her case, this subset of evidence did not violate the rule of *Browne v. Dunn*.

 

However, the husband also tried to give evidence of events relating to the unreported cash income issue that was ***not*** raised in the affidavits (including, for example, about a dinner when the husband claimed to have seen the wife accept a cash payment, and about a time when the wife had directed the husband to pick up a cash payment for her). As the wife did not know the husband would be adducing this evidence as part of his case, and as these allegations had not been put to her in cross-examination, she had not had an opportunity to address them. And, as the husband was clearly trying to adduce this evidence to prove that the wife had not been forthcoming about the cash income issue, he conceded that this evidence violated the rule of *Browne v. Dunn*.

As there was no dispute that the husband had not complied with the rule of *Browne v. Dunn*, the real question for Justice Fowler Byrne was that of the appropriate remedy. This required her to consider a number of factors that were summarized by the Ontario Court of Appeal in *R. v. Quansah*, 2015 CarswellOnt 4940 (C.A.) at para. 117, including:

- the seriousness of the breach;
- the context of the breach;
- the timing of the objection;
- the position of the offending party;
- any request to permit recall of a witness;
- the availability of the impugned witness for recall; and
- the adequacy of an instruction to explain the relevance of failure to cross-examine.

[See also *Curley v. Taafe*, 2019 CarswellOnt 6859 (C.A.) at para. 31, where the Ontario Court of Appeal confirmed that these factors apply in the family law context.]

Although trial judges have broad discretion when it comes to remedying breaches of the rule in *Browne v. Dunn*, the most common remedies are to "take into account the breach of the rule when assessing a witness's credibility and deciding the weight to attach to that witness's evidence", or to "allow counsel to recall the witness whose evidence was impeached without notice": *Curley v. Taafe*, 2019 CarswellOnt 6859 (C.A.) at para. 31. Excluding the offending evidence may also be available in certain circumstances, although it "should be a last resort and only exercised where any other remedy would be unduly prejudicial to the other party": *Audmax Inc. v. Ontario (Human Rights Tribunal)*, 2011 CarswellOnt 262 (Div. Ct.).

In this case, Justice Fowler Byrne found that the breaches were serious but unintentional. She was also of the view that it was essential to ensure that "all relevant evidence be heard by me, and that I have every opportunity to assess the credibility of all witnesses." Accordingly, she decided the appropriate remedy would be to allow the wife and her bookkeeper to be recalled to address the husband's evidence on the unreported cash income issue that had not been put to them in cross-examination. She also ordered that the husband pay any extra costs that would be incurred as a result of these witnesses having to be recalled.

Given that the wife was asking the court to exclude the evidence in question entirely, this was a fortunate, albeit potentially expensive, lesson for the husband. That said, this case offers an important lesson for all of us: pay attention. Breaches of the rule in *Browne v. Dunn* are not always readily apparent in real time and are easily missed if trial counsel is not on top of the testimony that *is* being given, and that *was* previously given. If your witness is being cross-examined on allegations of fact that are new to you, there is a *possible* breach of the rule in play. And if you are about to elicit evidence from one witness to impeach the evidence of another, you have to make sure your eagerness did not accidentally lead to a violation of the rule.

**Finally!!! The Answer to the Question Is . . . We Still Don't Know**

*S-L.T. v. M.L.* (2023), 92 R.F.L. (8th) 32 (Ont. S.C.J.) — Bale J.

  

*S-L.T.* is yet another case about whether and when a court in Ontario will enforce an agreement to arbitrate a family law case that does not *strictly* comply with the formal requirements of a "family arbitration agreement" under the *Family Law Act*, R.S.O. 1990, c. F.3 or under the *Arbitration Act, 1991*, S.O. 1991, c. 17 or the associated *Family Arbitration Regulation*, O. Reg. 134/07. As we've lamented on numerous occasions in *TWFL*, including in the June 6, 2022 (2022-20) edition, the caselaw about this important issue is hopelessly conflicted:

> We have clearly reached the point where it is impossible to predict what a court is going to decide when considering whether to hold parties to an agreement to arbitrate. The Government of Ontario may have had good intentions when it enacted the Regulation and amended Ontario's arbitration legislation over a decade ago to add specific requirements for family arbitrations. However, the current state of the law in this area is completely untenable, and is in desperate need of either reform, or clarification from an appellate court. But unless and until that happens . . . good luck.

It is clear how much influence we have.

Unfortunately, while we agree with the result in *S-L.T.*, the reasons do not resolve or address the conflicting caselaw.

The parties in *S-L.T.* were married in 2007. They had two children together. They separated in 2015. After years of litigation, they finally resolved their dispute on a final basis.

Their settlement included a comprehensive parenting plan for their children, who by that point were 16 and 13 years old. It provided, among other things, that any issues that arose regarding the interpretation or implementation of their parenting plan, would be resolved by a parenting coordinator:

> **In the event that the parties disagree on the interpretation and/or implementation of any parenting provision herein, the parties shall jointly retain the service of a parenting coordinator to assist in resolving the issue.** The parties shall share equally in the parenting coordinator's fees, unless otherwise directed by the parenting coordinator, who shall have discretion to allocate fees and disbursement unequally if the parenting coordinator considers that fair. The parties shall utilize the services of Lourdes Geraldo for parenting coordinator, subject to her availability and consent. In the event that Lourdes Geraldo is unable or unwilling to act as the parenting coordinator, the parties shall jointly retain another mutually agreed parenting coordinator. [emphasis added]

Pretty clear.

By "parenting coordination," the parties agreed that if any day-to-day parenting issues arose, their chosen professional would first try to help them resolve the matter through mediation, and if they could not reach an agreement, that same professional would decide the issue(s) through binding arbitration.

The terms of the parties' settlement, including the parenting coordination clause, were incorporated into a consent order that was granted by Justice Donohue on December 1, 2021. Those provisions, therefore, became an Order of the Court.

The paragraph of the parties' agreement and order that is set out above was clear that the parties intended to arbitrate any future disputes about the interpretation and/or implementation of any parenting provision. However, there is also no dispute that this paragraph, on its own, did not constitute a Secondary Arbitration Agreement for the purposes of the *Family Arbitration Regulation* to the *Arbitration Act, 1991*, which, as we explained in the September 20, 2021 (2021-36) edition of *TWFL*, must include, among other things:

> • Confirmation that the arbitration will be conducted in accordance with the law of Ontario or another Canadian jurisdiction;
>
> • Details of the parties' appeal rights (subject to the caveat that parties in family law cases cannot contract out of the right to appeal entirely, and at a minimum must always be able to appeal on a question of law with leave of the court); and

 

• Confirmation from the parties' chosen arbitrator that they will treat the parties equally and fairly, that they have received the necessary prescribed training, and that the parties have been screened for power imbalances (and that the results of the screening will be considered throughout the process).

After the order was granted, the mother repeatedly asked the father to retain their chosen parenting coordinator to address a number of contentious day-to-day parenting issues, including information sharing, attendance at special events, travel consents, phone contact with the children, and transferring the children's belongings between households — not the types of issues that could (or should) be dealt with by a judge, but precisely the types of issues that could (and should) be handled by a parenting coordinator.

But despite having already agreed to parenting coordination as a term of their settlement, and even though their agreement had been incorporated into a court order, the father refused to cooperate as he believed that parenting coordination "was not likely to be successful", and "was not necessary." This takes "Father Knows Best" to a whole new level.

The mother brought a motion to compel the father to comply with the terms of their agreement and the Consent Order and to retain the parenting coordinator.

As we recently discussed in the October 23, 2023 (2023-40) edition of *TWFL*, there are a number of Ontario cases, including Justice Chappel's decision in *S.V.G. v. V.G.*, 2023 CarswellOnt 8103 (S.C.J.), where judges have determined that, absent consent, the court does **not** have authority to force a party to submit an issue to arbitration — to do so would be the improper delegation of authority. However, the situation in *S-L.T.* was obviously quite different than in *S.V.G.*, because in *S-L.T.* the parties had already agreed to arbitration, and the court was merely being asked to compel one of the parties to comply with the agreed upon (and court-ordered) dispute resolution process.

Accordingly, Justice Bale had to decide whether she could force the parties to bestow arbitral authority on their chosen parenting coordinator. Relying on Justice Gray's decision in *Lopatowski v. Lopatowski* (2018), 3 R.F.L. (8th) 411 (Ont. S.C.J.), Justice Bale determined that the answer to this question was "yes", because while judges cannot delegate arbitral authority to a third party, they can and should compel parties to comply with court orders (if not their agreements). See also *Moncur v. Plante* (2021), 60 R.F.L. (8th) 102 (Ont. S.C.J.) and *Fekete v. Brown* (2022), 69 R.F.L. (8th) 183 (Ont. S.C.J.), both of which also followed *Lopatowski*.

In concluding that she could compel the father to arbitrate, Justice Bale also referred to Rule 1(8) of the *Family Law Rules*, which gives a court broad authority to make remedial orders to deal with non-compliance with a court order, and provides that "[i]f a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter . . . ". See also *Bouchard v. Sgovio* (2021), 63 R.F.L. (8th) 257 (Ont. C.A.), which we discussed in the February 14, 2022 (2022-06) edition of *TWFL*, where the majority of the Ontario Court of Appeal found that "if the remedy ordered addresses or '[deals] with the failure' to comply with the substantive order and the remedy ordered is found to be necessary to achieve the enforcement of the order being breached, that remedy is prima facie authorized by r. 1(8)."

Justice Bale ordered the father to provide the mother with the names of three accredited parenting coordinators within 14 days, ordered the mother to pick one of them within 14 days, and ordered the parties to retain that professional. And, to try and ensure that the father understood that there would be consequences if he did not change his behaviour, Justice Bale also determined that further non-compliance by the father would constitute a material change in circumstances that would allow the mother to seek a variation, while the father would not be able to seek a variation without leave of the court. Nice touch.

Furthermore, since the parties did not agree on the term of the parenting coordinator's mandate, Justice Bale ordered that s/he would be engaged for at least six months. She also made it clear that she expected the parties to cooperate with the process, and warned them that they were "unlikely to be successful in a Motion to Change proceeding, on the basis of their inability to coparent, difficulty in implementing existing parenting terms, or unsuccessful efforts to manage conflict between them, in the absence of demonstrated good faith efforts to participate in this valuable alternative dispute resolution process."

 

We completely agree with Justice Bale's decision to require the father to follow the parties' agreed upon — and court-ordered — dispute resolution process. If parties agree to arbitrate some or all of the issues in their case, they should not be able to resile based on a technicality. The *Family Arbitration Regulation* to the *Arbitration Act, 1991* was *not* meant to operate as an escape route for the recalcitrant.

That being said, it is unfortunate that the decision doesn't address the line of cases that have *refused* to enforce an agreement to arbitrate that did *not* comply with the formal requirements of a Family Arbitration Agreement or Secondary Arbitration Agreement in the regulation to the *Arbitration Act, 1991*, including *Horowitz v. Nightingale* (2017), 94 R.F.L. (7th) 151 (Ont. S.C.J.) and, more recently, *Monteiro v. Monteiro* (2022), 73 R.F.L. (8th) 147 (Ont. S.C.J.).

While the weight of authority appears to favour upholding these agreements (including *Lopatowski*, *Moncur*, and *Fekete*, as well as *Giddings v. Giddings* (2019), 35 R.F.L. (8th) 418 (Ont. S.C.J.)), especially once included in an Order of the Court, unless and until this area of law is clarified, it will remain difficult to predict what a court might do when faced with a request to compel a party to comply with an only-technically-offside agreement to arbitrate. Accordingly, for now, the *best* practice is to continue ensuring that the formal arbitration agreement is signed by the parties *and the arbitrator*, and the parties are screened for power imbalances *before* any settlement or agreement that includes a requirement to arbitrate is finalized. While this is inconvenient and can add to both parties' costs (especially in cases where it is unclear whether it will ever even be necessary to invoke the arbitration clause), for now it is the only way to make sure that an agreement to arbitrate will be enforceable.

While the above is the "five gold star" solution, it is rarely possible to achieve the "five gold stars" when finalizing Minutes of Settlement in Court. In such circumstances, counsel should include all of the provisions required by the *Regulation* in the Minutes of Settlement. For example:

In the event [NAME] is called on to arbitrate any issues, the parties agree:

> a. The arbitration will be conducted in accordance with the law of Ontario and the law of Canada as it applies in Ontario.
>
> b. Any award may be appealed [SET OUT APPEAL RIGHTS].
>
> c. [THE ARBITRATOR] will treat the parties equally and fairly in the arbitration, as subsection 19(1) of the *Arbitration Act, 1991* requires.
>
> d. [THE ARBITRATOR] has received the appropriate training approved by the Attorney General.
>
> e. The parties will sign [THE ARBITRATOR'S] standard Arbitration Agreement.
>
> f. Each of the parties will be separately screened for power imbalances and domestic violence, and [THE ARBITRATOR] will consider the results of the screening and will do so throughout the arbitration.

It is also a good idea to include wording confirming that the parties are of the view that they have bound themselves to the arbitration process.

And while this does leave the parties to be screened for power imbalances, courts have historically been willing to force parties to attend for such screening to animate an agreement to arbitrate: *Wainwright v. Wainwright* (2012), 21 R.F.L. (7th) 415 (Ont. S.C.J.); and *Z.S. v. B.P.* (2020), 39 R.F.L. (8th) 214 (Ont. S.C.J.).