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

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## Breaking News . . .

On May 16, 2024, the Supreme Court of Canada granted the Applicant Mother leave to appeal from the Ontario Court of Appeal's decision in *Ahluwalia v. Ahluwalia* (2023), 88 R.F.L. (8th) 1 (Ont. C.A.). We commented on the Court of Appeal's decision, in which the court concluded that it was not necessary to establish a new tort of family violence to address patterns of coercive and/or controlling behaviour in the domestic context, in the July 17, 2023 (2023-28) edition of *TWFL*.

We will certainly be tuning in to the webcast of the hearing before the Supreme Court, and will keep you updated on any further developments.

## Keep Your Laptop Out of My Zettabytes

*Moran v. Moran* (2023), 98 R.F.L. (8th) 464 (Ont. S.C.J.) — Kraft J.

**Issues:** Ontario — Surreptitious Access of Electronic Files and Documents

It is estimated that the total amount of data created, captured, copied and consumed in the world as of 2025 will be 175 zettabytes — the equivalent of 175 trillion gigabytes. One zettabyte is 8,000,000,000,000,000,000 bits of information. That's a lot of bits and bytes.

To some, this represents the complete amassed knowledge of humankind.

But to those engaged in family litigation, this represents a possible treasure trove of information. To some family litigants, the ability to access the private digital information of another proves just too tempting. (Not that this only applies to family litigants — see the February 5, 2024 (2024-05) edition of *TWFL* where we discuss *2177546 Ontario Inc. v. 2177545 Ontario Inc.*, 2023 CarswellOnt 16112 (C.A.).)

In this case, Justice Kraft had to decide what to do where a Wife was caught having surreptitiously accessed files from the Husband's computer. After being caught, it was agreed that the Wife had gained access to the Husband's private computer files, documents, e-mails and text messages by entering the matrimonial home and downloading his information onto her laptop.

At the motion, the Husband wanted to compel the Wife to deliver all computers she used to download his information so that a third-party forensic investigator could conduct a full audit of the electronic documents she took from the Husband and determine to whom those documents might have been distributed. (The Husband wanted to identify and inventory all the digital records the Wife had accessed.) The Husband further sought an order that he be permitted to choose the forensic investigator

and that the Wife pay all the associated costs. And finally, he wanted an order restraining the Wife from distributing any of the documents/records/information she obtained from his computer and to disclose all of the third parties to whom she had sent any of the information.

The Wife had her own forensic investigator whom she proposed should handle the process of identifying and providing the electronic files and records.

Justice Kraft framed the issues before her as follows:

- (a) Which forensic investigator should be chosen to review the Wife's computer to determine the extent of what electronic documents she accessed surreptitiously and what is the nature and scope of review to be completed by this forensic investigator;
- (b) Who would pay for the cost of the forensic investigation;
- (c) Should the Wife be restrained from disseminating or distributing any information she obtained from the Husband's computer to any third parties; and
- (d) Should the Wife be required to produce a list of all third parties to which she had already sent the Husband's electronic data.

The parties did not dispute the background facts as to how the Wife had accessed the files. The court did, however, highlight the fact that the Wife showed absolutely no remorse for her actions. Rather, she blamed the Husband for her having to take the steps she did to obtain the documents because of his persistent failure to provide timely disclosure. That's not quite the definition of chutzpah, but we're certainly in the area.

The parties also agreed as to how the Wife's actions had come to light. The Wife had attached documents as exhibits to an Affidavit; and had put documents to the Husband on Questioning, that he had not provided.

Then, during Questioning, the Wife admitted to having provided the Husband's documents to her lawyers and to her accountant and his team. However, she denied accessing any "privileged information," and when questioned she stated that she deleted the privileged documents without reviewing them. Well of course she did.

Justice Kraft first set out that the Husband was entitled to know what documents the Wife took from his computer, and what she reviewed, deleted and shared with her legal team. The Wife's counsel argued that the Wife did not "steal" the documents because a copy remained in the Husband's possession and that should be the end of it. A valiant try, but Justice Kraft made short work of this argument. The Wife copied and accessed the Husband's private and confidential information in such a way that he would not have known she had done so. He only realized it when she attached documents to her Affidavit.

While the Wife claimed that she had not accessed any privileged information, it was impossible for the Husband to know if that was true.

The legal test to decide the appropriate remedy where privileged information is accessed or received by an opposing party or its counsel is set out in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 CarswellOnt 4623 (S.C.C.); *Continental Currency Exchange Canada Inc. v. Sprott*, 2023 CarswellOnt 873 (C.A.); and *2177546 Ontario Inc. v. 2177545 Ontario Inc.*, 2023 CarswellOnt 16112 (C.A.). It is a three-part test as set out by Court of Appeal in *2177546*. Here it is in a nutshell:

- a. At the first stage, the moving party (in this case, the Husband) must establish that the opposing party (in this case, the Wife) accessed relevant privileged material. In this case, the Wife acknowledged that she had accessed privileged documents, but said she deleted them. Without a forensic review of what was surreptitiously taken by the Wife, it would be impossible for the Husband to know the extent of privileged materials that she had obtained.

b. At the second stage, *the risk of significant prejudice is presumed*. The Husband did not have to prove "the nature of the confidential information" disclosed: *Celanese*, at paras. 42 and 48. Rather, the Wife had the onus to rebut the presumed prejudice flowing from receipt of privileged information: *Celanese*, at para. 48.

The presumption of prejudice could have been rebutted by the Wife identifying "with some precision" that:

- i. she did not review *any* of the privileged documents in their possession;
- ii. she reviewed *some* documents, but they were not privileged; or
- iii. the privileged documents reviewed were "not likely [to] be capable of creating prejudice": *Celanese*, at para. 53. The evidence had to be "clear and convincing" such that "[a] reasonably informed person would be satisfied that no use of confidential information would occur": *MacDonald Estate v. Martin, 1990 CarswellMan 384* (S.C.C.), at pp. 1260-63; see also, *Celanese*, at para. 42. Again, a *fortiori* undertakings and conclusory statements in affidavits, without more, will not suffice: *MacDonald Estate*, at p. 1263.

Where the precise extent of privileged information is unknown and possibly unknowable, the court should *infer* that confidential information was imparted unless the party has satisfied the court that no information was imparted which could be relevant: *MacDonald Estate*, at p. 1290. Here, the Husband could not assess what had been taken without a third-party review of the electronic records. Once a complete review of the computers was undertaken, and depending on the outcome of that review, the Husband could be entitled to seek a stay of proceedings or to seek to remove the Wife's legal team.

As summarized in *Celanese* at paras. 49-51, there are compelling reasons for the presumption of prejudice and the reverse onus on the parties in receipt of privileged information including:

- i. Requiring the Husband whose privileged information had been disclosed or accessed to prove actual prejudice would require him to disclose further confidential or privileged materials;
- ii. Placing the burden on the Wife who has access to the privileged information accorded with the usual practice that "the party best equipped to discharge a burden is generally required to do so"; and
- iii. The Husband did not have to bear "the onus of clearing up the problem created by" the Wife's actions.

c. The third stage of the analysis is to fashion an appropriate remedy.

With that in place, Justice Kraft set out that only after there was a complete record of the extent of the surreptitiously obtained evidence could the three-part test be applied.

During the Wife's Questioning, she had refused to provide her laptop, but she agreed to make best efforts to produce a complete record of the Husband's documents and files she had copied from his computer. However, the Wife's counsel had taken the laptop into their possession for safekeeping since the Questioning to preserve the electronic records. The Wife proposed retaining independent e-discovery counsel to assist with the process of producing an electronic record of the documents she removed from the Husband's computer. The Wife attached an eDiscovery proposal from her proposed expert:

1. The expert would be given access to the Wife's computer. It would collect identified folders of documents and e-mail data.
2. The collected data would be put in a Data Room.
3. The neutral expert would review the database and identify privileged information and relevant information.

4. The Wife would ultimately be provided with the non-privileged relevant information. The Husband would be provided with the entirety of the database.

The Husband, however, wanted to use his expert to take an image of the Wife's computer so that his forensic investigators could undertake a full review of her computer to identify what records were taken. This would also preserve the metadata on these records.

Ultimately, the real difference between the two proposals was that the Wife's proposal would essentially rely on her to identify the folders on her computer where the documents resided. The Husband's methodology, however, would see all of the folders searched. The Wife argued that the Husband's proposal could violate her privacy. OK — now we're in chutzpah-ville.

Caught between these two extremes, Justice Kraft accepted the Wife's proposal as being appropriate, but expanded the scope of her expert to include the investigatory role that the Husband was seeking.

The Wife was ordered to pay the up-front costs subject to reapportionment at trial.

Justice Kraft then considered whether the Wife should be restrained from sending any of the Husband's private records to any third parties. The Wife argued that the Husband was "overreaching" and that a restraining order was not necessary.

Justice Kraft determined that s. 46(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 would permit this kind of restraining order. The court set out that the purpose of an interim restraining order was to "permit both litigants the opportunity to conduct their litigation in as reasoned an atmosphere as may be possible" and to "provide the litigants with some element of order in the context of difficult and acrimonious litigation."

Justice Kraft disagreed with the Wife's claim that the Husband's request was "overreaching." The Wife had taken digital records from the Husband without his consent. And she had already shown she had no problems disseminating this information to third parties. Allowing her to continue to do so would not be fair to the Husband in these circumstances. The Husband was entitled to know, at least until the forensic audit was completed, that the Wife would be restrained from distributing any of his documents to third parties.

Finally, Justice Kraft determined it was reasonable to order the Wife to produce a list of all contacts, including their names and contact information, to whom she had sent the Husband's documents.

Computer-surfing can come with significant costs when the computer on which you are surfing is not your own.

## A Review of Reviewing Reviews

***F. (L.C.) v. B. (W.P.) (2023), 94 R.F.L. (8th) 1 (P.E.I. C.A.) — Gormley, Murphy and Laughlin JJ.A.***

**Issues:** Prince Edward Island — Spousal Support — Variation and/or Review

*F. (L.C.) v. B. (W.P.)* is yet another example of the court struggling to understand the important differences between a spousal support **variation**, and a spousal support **review**, and therefore, provides an opportunity for a quick refresher.

While many readers will already be keenly aware of the differences between a variation and a review, for those you who are not, pursuant to s. 17(4.1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) (and equivalent provisions under provisional support legislation), a court can only vary a spousal support order if there has been a material change in circumstances (or, to use the wording of s. 17(4.1) of the *Divorce Act*, "a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order[.]").

As we most recently discussed in the April 8, 2024 (2024-14) edition of *TWFL*, to establish a material change in circumstances, the party seeking the change has to persuade the court that there has been a change that "if known at the time [of the original order] would have likely resulted in different terms": *L.M.P. v. L.S. (2011), 6 R.F.L. (7th) 1 (S.C.C.)* at para. 32. However, even

if the court is satisfied that such a change has occurred, that does not allow the court to conduct a *de novo* hearing. Rather, as the Supreme Court explained at para. 47 of *L.M.P.*, if a material change is established, the judge hearing the variation proceeding "must determine what variation to the order needs to be made in light of the change in circumstances", and "should limit itself to making only the variation justified by that change."

In contrast, a *review* allows the court to change a support order after a certain amount of time or upon the happening of a specific event (e.g. the payor's retirement, the children finishing school, etc.) *without the need for a material change*. Unless the initial order or agreement says otherwise or circumscribes the terms of the review, a review allows the court to conduct a fresh hearing, and consider all of the relevant factors, including entitlement, needs, means, etc.: *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.); *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.) at para. 63; *Toth v. Toth* (2016), 73 R.F.L. (7th) 24 (B.C. C.A.) at para. 11; *Morck v. Morck* (2013), 28 R.F.L. (7th) 279 (B.C. C.A.) at para. 17; *M.T. v. J.S.* (2023), 86 R.F.L. (8th) 281 (B.C. C.A.). (And, just to be clear, the Supreme Court of Canada suggests that the terms of a review ought to be precisely circumscribed: *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.).)

Although the Supreme Court of Canada confirmed in *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.) that courts can make review orders in appropriate circumstances, the court also made it clear that:

1. "Insofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under s. 17 on proof of a change of circumstances."
2. Courts should generally refrain from making review orders (i.e. orders where it is not necessary to establish a material change).
3. Courts should only make a review order if there is "genuine and material uncertainty at the time of the original trial", and even then "the issue should be tightly delimited".

The parties in *F. (L.C.) v. B. (W.P.)* were married for more than 30 years before they separated in 2019.

During the marriage, the husband worked for the RCMP. When the parties separated and for several years thereafter, the husband earned approximately \$150,000 a year. However, he earned \$244,000 in 2022 and \$187,000 in 2023.

The wife initially worked for the Public Service Commission of Canada, but she was forced to retire from her position in 1996 because she had severe diabetes that resulted in significant complications, including diabetic retinopathy that reduced her vision and prevented her from driving.

After the wife retired, the parties adopted a child. The wife was primarily responsible for raising the child and taking care of the home, while the husband continued working and progressing through the ranks with the RCMP.

The parties' 4-day family law trial primarily dealt with the issue of spousal support, and the most contentious issue was the husband's request that his spousal support payments to the wife terminate when he turned 62 in 2025, his planned retirement date. The wife opposed the husband's request for a fixed termination date. She argued the husband should not be able to "shirk" his spousal support obligations by taking what she viewed as "voluntary early retirement."

The trial judge found that the wife had a strong non-compensatory support claim because "[s]he has been unable to work since at least 1996 and would suffer a significant decline from the marital standard of living without spousal support." He also found that the wife was entitled to compensatory support because she had "shouldered the bulk, at times 100% of the child rearing", and that "because she was home fulltime, [the husband] was able to advance his career by working more overtime and by taking two tours of duties overseas." However, he also described the wife's compensatory claim as "not strong", because the "economic loss she suffered was not a result of the roles played in the marriage", but rather because of her health issues.

After calculating the parties' incomes for support purposes and considering the SSAGs, the trial judge determined that the husband should be paying the wife \$6,500 a month in spousal support. This amount was between the mid and high-end of the range based on the parties' respective incomes in 2023 (\$187,000 for the husband and \$18,500 for the wife), which the

trial judge explained was appropriate because of the length of the marriage, as well as the wife's health issues and associated medical expenses.

With respect to duration, the trial judge rejected the husband's request to terminate support when he turned 62, and he agreed with the wife that 65 would be a reasonable age for the husband to retire. In reaching this conclusion, the trial judge determined that:

1. If the husband retired prior to age 65, he should be imputed with an income equivalent to what he would be earning with the RCMP until he reached age 65, and that support could not be "**reviewed**" before age 65 unless there was "**an unforeseen material change** in circumstances unrelated to his early retirement."
2. If the husband continued to work after age 65 "the **review** may take place upon his retirement."

In other words, the trial judge ordered that absent an unforeseen change in circumstances, spousal support would be fixed and non-variable until the latter of the husband's 65th birthday or his retirement, at which point the spousal support arrangements would be reviewed.

We are regularly involved in cases where parties *agree* to: (a) fix the support arrangements for a period of time unless something wholly unexpected or catastrophic occurs (sometimes referred to as an "involuntary catastrophic reduction in income" clause); and then (b) review the support arrangements at the end of the fixed period. In more complicated cases, particularly ones involving self-employed payors, this type of arrangement can be beneficial to the parties because it avoids the need for them to spend time and money *every year* arguing about what the "right" amount of support should be. We usually see the threshold for a variation during the fixed and non-variable period described as a "catastrophic change in circumstances". However, it appears that the trial judge was trying to achieve a similar result by pre-determining what would happen if the husband chose to retire before age 65, instead of leaving that decision to a future variation proceeding where, to use the words of the Court of Appeal, the court would be able to conduct "a full hearing" where "the financial position of both parties can be verified and all relevant factors be put before the judge." For further discussion about "catastrophic change in circumstances" clauses, see *Rokach v. Rokach* (2021), 74 R.F.L. (8th) 237 (Ont. Div. Ct.) at paras. 28-31.

That being said, we cannot recall having seen any cases where a trial judge has made an order prohibiting a party from seeking a variation in the event of a material change in circumstances, and are not aware of any provisions in the *Divorce Act* or any cases that would give a court jurisdiction to make such an order. In fact, there are several cases that suggest quite the opposite: *Bemrose v. Fetter* (2007), 42 R.F.L. (6th) 13 (Ont. C.A.); *Patton-Casse v. Casse* (2011), 8 R.F.L. (7th) 343 (Ont. S.C.J.), aff'd (2012), 29 R.F.L. (7th) 210 (Ont. C.A.); *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.).

It seems the Prince Edward Island Court of Appeal was of the same view, and found that the wording used by the trial judge was both "confusing" and "incompatible with the *Divorce Act* objectives". As a result, it set aside the review order, and ordered that the parties' support arrangements would be subject to the usual threshold for a variation (i.e. a material change in circumstances):

[35] The difficulty here lies in the terms or conditions for review. **The condition restricts a review hearing until the latter of [the husband's] 65th birthday (April 30, 2028) or his retirement, and specifically provides that [the husband's] "early retirement" will not be considered a material change in circumstances.** The order also provides "absent an unforeseen change in circumstances, a review hearing shall not take place . . . ". **Not only is the wording confusing but also incompatible with the *Divorce Act* objectives as it creates an inequitable result.** The provision for a review is antithetical as a review does not require a party to show changed circumstances, and retirement in itself, is a factor that generally, although not always, may trigger an application for a variation as it is generally considered a material change in circumstances. **To place such a limitation would foreclose an application for variation as provided by s. 17 of the *Act* and therefore is inconsistent with the objectives and purposes of the *Act*.** This is an error in principle, and, as a result, I would set aside the order for a review hearing. [emphasis added]

The Court of Appeal also made it clear that the questions of whether and when the husband's support payments should change and/or end should be dealt with in the future "where a full hearing can be held in which the financial position of both parties can be verified and all relevant factors be put before the judge."

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