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

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Breaking News: Break Out Your Vexatious Litigant Party Hats

On August 2, 2024, the Ontario Government introduced Ontario Regulation 322/24, meant to rework the vexatious litigant regime in Ontario. The regulation revises the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and creates a comprehensive regime for addressing frivolous, vexatious, or abusive litigants — the kinds of litigants that are all-too prevalent in family law courts (to say nothing of Organized Pseudolegal Commercial Argument litigants: *Meads v. Meads*, 2012 CarswellAlta 1607 (Q.B.)).

To address the problem, the *Courts of Justice Act*, R.S.O. 1990, c. C.43, once amended, will now allow for a party to apply for a "vexatious litigant order" against another person. If the order is granted, the litigant will be barred from starting or continuing any proceedings without leave.

Presently, there is no unified provision for dealing with vexatious litigants in Ontario — the regime was a combination of provisions under the *Rules of Civil Procedure* and the *Courts of Justice Act*. The current regime is highly inconvenient: even if a vexatious proceeding is dismissed under Rule 2.1 of the *Rules of Civil Procedure*, the vexatious litigant is not prevented from bringing further vexatious proceedings. Rather, to stop a vexatious litigant from bringing or continuing proceedings, a *separate* (new) original application under s. 140 of the *Courts of Justice Act* is required — even when the grounds for the vexatious litigant order arise from an ongoing proceeding.

The new regulation amends Rule 2.1 and introduces a new Rule — Rule 2.2 (to come into force on a day to be proclaimed by the Lieutenant Governor for Ontario).

Amended Rule 2.1 will allow either a party *or the court* to request an order that a proceeding or motion be dismissed.

There will be a few new Forms: a "Request for Stay or Dismissal under Rule 2.1" and "Notice that Proceeding (or Motion) May be Stayed or Dismissed Under Rule 2.1."

Upon receipt of the first Form, the court will determine whether a dismissal or stay may be appropriate; and if so, the Registrar will deliver the second Form. Upon delivery of the second Form by the Registrar, the proceeding is automatically stayed.

Rule 2.1(8) then sets a procedure for both parties to make submissions about the potential dismissal, after which the court may stay or dismiss the proceeding.

The new Rule 2.2 will then set out a unique procedure for vexatious litigant motions and applications. It provides that a vexatious litigant order can now be made on motion by a party in an *existing* proceeding; or on the court's own initiative (or *ex proprio motu*, for those that like Latin); or on the application of a party in any other case.

When a party who is the possible subject of a vexatious litigant order receives one of the above notices, the subject party may serve and file new Form 2.2D: Response from Potential Subject of Vexatious Litigant Order, and the moving party then has the right of reply.

Then, under Rule 2.2.06(2), a judge will then conduct an initial review of the materials and can then direct a hearing or dismiss the matter via new Form 2.2F "Order Following Initial Review Under Rule 2.2." The court can make any orders or give any directions that may be necessary, including a Vexatious Litigant Order (new Form 2.2G).

The court is also given the jurisdiction to stay or dismiss any proceeding — without notice — brought or continued by a party that is subject to a Vexatious Litigant Order. And the Registrar is granted the power to refuse to issue or file any documents from a vexatious litigant.

The amendments to s. 140 of the *Courts of Justice Act* also clarify the appeal process for a Vexatious Litigant Order. Orders from the Superior Court of Justice are appealed to a panel of the Court of Appeal; and orders made by a judge of the Court of Appeal (which is now permitted via the amendments) can be set aside or varied by a panel of the Court of Appeal.

So now you're all wondering: will these changes be applicable to the *Family Law Rules*, O. Reg. 114/99, through Rule 1(7) by reference to the *Rules of Civil Procedure*?

Should be.

Hope so.

We'll see.

Arbitrators . . . They Don't Get No Respect — Rodney Dangerfield

***Giacchetta v. Beck*, 2024 CarswellAlta 2038 (K.B.) — Ho J.**

Issues: Alberta — Appeal of Arbitration Award — Error of Law

The parties were in a common law relationship, but for ease, we refer to them as "husband" and "wife".

After the breakdown of the relationship, the parties agreed to arbitrate the division of property and spousal support, and they signed an Arbitration Agreement which permitted appeals on errors of law only.

The Arbitrator issued an award on December 15, 2022 (the "main decision") and a clarification and correction on April 24, 2023.

The husband appealed the main decision and the clarification by way of Application to the Court of King's Bench. Not to be outdone, the wife filed her own appeal a few days later.

The husband argued that the Arbitrator erred in law by failing to use *or implement* the appropriate legal test for unjust enrichment, failing to review the materials provided, and failing to give sufficient reasons. The wife's appeal also suggested the Arbitrator erred in law by failing to use or *implement* the law of unjust enrichment. [Notice the alleged legal error with respect to the *implementation* of the law — that sure doesn't sound like an *error of law* (as opposed to an alleged *error of mixed fact and law* — more on that below).]

Both parties sought to have both the main decision and the clarification varied or set aside, or in the alternative, to have the matter remitted back to arbitration.

As noted, the parties had limited themselves to appeals on errors of law pursuant to s. 44 of the *Arbitration Act*, R.S.A. 2000 c. A-43. Therefore, questions of fact or questions of mixed fact and law were not reviewable. And the standard of review on a question of law is correctness: *Esfahani v. Samimi* (2022), 92 R.F.L. (8th) 272 (Alta. K.B.) at paras. 31 and 85.

That then begs the (sometimes) challenging question: what is an error law?

Justice Ho answered this question with reference to Justice Fruman's explanation in *Alberta (Workers' Compensation Board) v. Appeals Commission*, 2005 CarswellAlta 1110 (C.A.):

> [29] The concept of an extricable legal error can be difficult to understand. In *Housen* at para. 36, the Supreme Court provided clarification. In that case the alleged error was a finding of negligence, a question of mixed fact and law. The Court noted that **when the error in a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test or a similar error in principle, such an error can be characterized as an extricable error of law.** However, when the issue on appeal involves a trial judge's interpretation of the evidence as a whole, or the application of the correct legal test to the evidence, there is no extricable error of law. [**emphasis** added]

While that is unquestionably a correct statement, we offer the following more direct explanation from the Supreme Court of Canada at para. 39 of *Canada Director of Investigations and Research, Competition Act) v. Southam Inc.*, 1997 CarswellNat 368 (S.C.C.):

> [39] . . . After all, if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

We also offer the following simplified and direct explanation as to the differences between questions of law, fact and mixed fact and law from the recent decision of Justice Kraft in *Medjuck v. Medjuck*, 2024 CarswellOnt 7983 (S.C.J.):

> [46] **Questions of law are questions about what the correct legal test is. Questions of fact are questions about what actually took place between the parties. Questions of mixed law and fact are questions about whether the facts satisfy the legal test**: *Canada Director of Investigations and Research, Competition Act) v. Southam Inc.* (1997), 1997 CanLII 385 (SCC), 144 D.L.R.(4th) 1 (S.C.C.); *Ferreira v. Esteireiro,* 2013 ONSC 4620 (CanLII) at para. 22.
>
> [47] As I see it here, the question the Arbitrator had to decide is whether Akiva should be compelled to trace "all" the funds received by the NBA from the CRA which was about $5 million on account of Canada Emergency Wage Subsidy. **Doing so required the Arbitrator to consider all the facts to support such a finding and all the facts that militated against such a finding.** Regardless of whether deciding whether Akiva should trace "all" or "some" of the CRA Covid wage subsidies received by the NBA, **it could not be determined without the Arbitrator considering the facts** the [sic] led to the parties Consent Award, the remaining issues he has to decide in terms of child and spousal support for the period January 1, 2023 onward, and then consider Akiva's income and ability to pay support. **This involves fact finding as well as considering the relevance and proportionality of the disclosure requested. I conclude at the very least it was an issue of mixed law and fact. I say this because the Arbitrator would have to apply legal principles to the evidence before him, to consider whether the particular facts satisfy the legal test of relevance and proportionality to trace "all" or "part" of the CRA wage subsidies to his company.** [**emphasis** added]

So . . . in this case, was Justice Ho presented with an error of law subject to appellate review?

The first alleged error of law was the fact that the Arbitrator had not reviewed the Affidavits of Records (those of us in other provinces may know this as an Affidavit of Documents).

The Arbitrator candidly admitted that he had not reviewed the husband's Affidavit of Records:

> I accept that even though the affidavit of records of [the husband] was not sent to me with his affidavits, it was provided to opposite counsel at some point and [the husband's] material clearly indicates (e.g., paragraph 3 of his May 27, 2022 affidavit) that he was relying on the materials in his affidavit of records in this application. **The absence of this affidavit in my own file** appears to be related to a change in counsel and an innocent omission. In that sense, I believe the affidavit

> of records was properly brought into evidence by [the husband]. **Since I cannot find it in my file**, there may have been an obligation on my part to have requested a copy once I realized that I did not have it . . . [**emphasis** in original]

Furthermore, the husband was clear in his affidavit before the Arbitrator that he was putting the entirety of his Affidavit of Records into evidence.

This was a problem, and Justice Ho determined that the Arbitrator's non-review of the entire Affidavit of Records was an error of law. He came to this conclusion based on para. 28 of *Ball v. Imperial Oil Resources Ltd.*, 2010 CarswellAlta 642 (C.A.):

> [28] The first three grounds of appeal allege that the trial judge made errors of law, either by coming to a conclusion on the basis of no evidence, **or by failing to consider relevant evidence. Either error, if demonstrated, will amount to an error of law**. As Roger P. Kerans and Kim M. Willey point out in *Standards of Review Employed by Appellate Courts*, 2d ed. (Edmonton: Juriliber 2006) at 137-38:
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> > The legal duty of the first judge is to consider all the evidence. If a piece of evidence is ignored by the first judge, the reviewing court would psay the trier was guilty of a " . . . failure to consider relevant evidence . . . " or " . . . a misapprehension of the evidence . . . " This is review [sic] by the concurrence (correctness) standard, even though it is sometimes offered in the same breath as a statement of the unreasonableness standard. Similarly, the corollary error, which would be to rely on non-existent evidence, invites review on a concurrence (correctness) basis. These kinds of mistakes by the first tribunals are errors of analysis, not factual errors. [**emphasis** added]

The wife's counsel argued that it would not, in fact, be an error of law to not consider *irrelevant* evidence and that a distinction had to be drawn between relevant evidence and irrelevant evidence. This makes sense as it cannot possibly amount to an error of law to not consider something wholly irrelevant; judges ignore irrelevant evidence put forward by one party all the time.

However, this submission was rejected by the court on the basis that the Arbitrator had *admitted* he had not reviewed the documents in the Affidavit of Records. In his Honour's view, "a failure to review the entirety of the records listed in an Affidavit of Records (where such records are explicitly put before the Arbitrator) will necessarily include the failure to consider some relevant evidence, or at a minimum create a situation where the trier of fact does not know what they have missed and is unable to assess what evidence is relevant or not."

But that skirts the issue: how can a failure to review irrelevant evidence amount to an error of law? In fact, the opposite holds — it is an error to review (or at least to rely on) irrelevant evidence. Therefore, one would think that the court would first have to review the documents in the Affidavit of Records to determine whether any of the records therein were of such relevance such that the failure to review them amounted to an error of law. That may very well have been the case — but a review was necessary. Had the Affidavit of Records been full of song lyrics, it would not have been an error of law to not consider them.

In any case, his Honour was of the view that this error of law infected the entire decision.

The second alleged error of law was with respect to the implementation of the legal test for unjust enrichment. There's that word "implement" again.

With respect to this alleged error, Justice Ho found that the Arbitrator correctly cited *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.) — the case both parties *agreed* was the leading authority on unjust enrichment. The Arbitrator had also engaged in a fulsome discussion about the application of *Kerr* to the facts. As noted, by his Honour (and as we alluded to above), the application (or implementation) of the law to the facts cannot be an error of law — it is an error of mixed fact and law, unless there is a clearly and cleanly extricable error of law buried in the application of the law to the fact, which should really be quite rare: *Housen v. Nikolaisen*, 2002 CarswellSask 178 (S.C.C.); *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 CarswellBC 2267 (S.C.C.). A question of whether the Arbitrator misapplied the correct legal test is not an alleged (or extricable) error of law. See also *Alberta (Workers' Compensation Board) v. Appeals Commission*, 2005 CarswellAlta 1110 (C.A.) at para. 29; *Myren v. Myren*, 2023 CarswellAlta 1893 (K.B.) at para. 21.

Therefore, a tip for the future: if you are ever alleging an "error of law," best to stay away from alleging errors in the "application" or "implementation" of the law.

The final alleged error related to an alleged insufficiency of reasons.

Here, the court found that the failure to consider evidence (as above) was "intertwined" with the alleged failure to provide sufficient reasons. According to Justice Ho, having found that the Arbitrator did not review the entirety of the Affidavit of Records, it was not surprising that the Arbitrator did not provide sufficiently detailed reasons in relation to some of his conclusions.

His Honour then goes on to find that, while the main decision provided sufficient reasons for many portions of the Arbitrator's analysis, the explanations provided by the Arbitrator on two issues — the quantification of a Las Vegas property and firearms were "particularly thin" and so insufficiently detailed as to amount to an error of law.

Respectfully, it is wrong to suggest that courts and arbitrators are "the same" when it comes to a consideration of sufficiency of reasons.

There can be no doubt that failure to provide reasons sufficient to permit meaningful appellate review is an error of law: *Custom Metal Installations Ltd v. Winspia Windows (Canada) Inc*, 2020 CarswellAlta 1695 (C.A.) at para. 32; *R. v. R.E.M.*, 2008 CarswellBC 2037 (S.C.C.); *R. v. Sheppard*, 2002 CarswellNfld 74 (S.C.C.); *Kalin v. Ontario College of Teachers*, 2005 CarswellOnt 2095 (Div. Ct.); *Lawson v. Lawson*, 29 R.F.L. (6th) 8 (Ont. C.A.); *Gibson v. ICBC*, 2008 CarswellBC 983 (C.A.); *Blanchard v. Legere* (2009), 64 R.F.L. (6th) 72 (N.B. C.A.); *Dovbush v. Mouzitchka*, 2016 CarswellOnt 7937 (C.A.). The parties are entitled to reasons responsive to the live issue and key arguments, and that show the path the judge followed from the evidence to the factual findings to the legal conclusions: *R. (N.E.) v. M. (J.D.)* (2011), 12 R.F.L. (7th) 70 (N.B. C.A.); *Gordashevskiy v. Aharon*, 2019 CarswellOnt 5514 (C.A.).

However, courts also recognize that arbitrations are not the same as proceedings in court — by design, and that the duty to provide sufficient reasons may not be as onerous on arbitrators as on courts. Arbitrations are intended to provide a faster and less expensive process to resolve disputes: *ENMAX Energy Corporation v. TransAlta Generation Partnership*, 2022 CarswellAlta 1424 (C.A.) at para. 29; *Esfahani v. Samimi* (2022), 73 R.F.L. (8th) 330 (Alta. C.A.) at para. 15.

As noted by Justice Herman in *Kroupis-Yanovski v. Yanovski*, 2012 CarswellOnt 11826 (S.C.J.):

> [113] Family law arbitrators are also required to provide adequate reasons . . . However, in determining whether an arbitrator's reasons are adequate it is important to keep in mind the features that distinguish arbitrations from court proceedings.
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> [114] Parties choose the arbitration route, at least in part, because it will be less costly and speedier than litigating through the court system. In this case, the parties agreed that the arbitrator would provide brief reasons, presumably because lengthy reasons have the potential to add expense and delay.
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> [115] Another distinguishing feature is that, unlike the court system, family law arbitrations are generally private proceedings. Indeed, parties may choose the arbitration route because of their desire for privacy. Thus, an arbitrator's reasons are not required in order for members of the public to satisfy themselves that justice has been done, nor are they required to stand as precedents, as is the case with decisions emanating from the courts.
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> [116] Nonetheless, an arbitrator's reasons are important so that the losing party knows why he or she has lost and for the purpose of appeal. Reasons are also mandated by the *Arbitration Act*. The reasons may be brief, but they must be sufficient to explain why the arbitrator reached his or her conclusion.

. . . . .

> [118] In my opinion, while the arbitrator's reasons are not lengthy (in accordance with the parties' agreement), they are sufficient to explain why the arbitrator preferred one offer over the other and for the purpose of appellate review. As a result, I conclude that they are sufficient to meet their required purpose.

To be clear, having not reviewed the reasons, we cannot determine whether the Arbitrators were sufficient. Our only point is the "sufficiency of reasons" is not necessarily the same for courts and arbitrators.

The Arbitrator's awards were set aside, and the matter was remitted back to arbitration before a different arbitrator.

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