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

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Ouch . . . Can't We Just All Get Along?

Jarosz v. Denda, 2024 CarswellOnt 12380 (S.C.J.) — Sharma J.

When a decision starts with, "[t]his motion is a good example of what family lawyers ought *not* do", you know it's going to be an interesting read.

Although Justice Sharma's reasons in *Jarosz* do not tell us much about the underlying facts of the case, they do reveal that:

1. The litigation started in 2021.

2. The Respondent, Mr. Denda, produced his expert reports in March 2022.

3. In January 2024 (i.e. almost two years after Mr. Denda produced his expert reports), the Applicant, Ms. Jarosz, retained her own expert and delivered a lengthy request for disclosure (it is unclear why it took Ms. Jarosz almost two years to retain her own expert);

4. The parties attended a Case Conference in April 2024, and Ms. Jarosz was granted leave to bring a motion for disclosure.

Although Ms. Jarosz claimed that the motion before Justice Sharma was only going to take an hour — in total — to argue, she delivered a voluminous motion record (more than 250 pages) that included a 90 paragraph affidavit and a 56 page chart with numerous subparagraphs requesting multiple documents and document types.

Despite the size of Ms. Jarosz's materials, however, the materials did not include "basic facts to explain why the requested disclosure is relevant", or a chart summarizing "the outstanding disclosure in a succinct, digestible manner, explaining what information was requested and when, why it is relevant, what has been produced, and whether the disclosure is proportionate."

Instead, Ms. Jarosz's motion record was largely comprised of "[e]xtensive re-copying of communication between counsel that hurls blame and attacks the opposing party or their logic, and includes settlement discussions", and "[d]iscussion of issues entirely unrelated to the straightforward issue of disclosure[.]" Uh oh. This does not seem to be going well.

In an attempt to prove that Ms. Jarosz's allegations of non-disclosure were false, Mr. Denda delivered a *massive* responding record of his own of more than 550 pages. Can you feel the "ick"?

When the matter came on for a hearing before Justice Sharma, he immediately let counsel know he was unimpressed, and instructed them to speak and figure out which specific items were outstanding and required a determination from the court.

He also asked the lawyers whether they had tried to discuss and narrow or resolve the issues in advance as required by the *Family Law Rules*.

The answer? Although Mr. Denda's lawyer had *tried* to discuss the matter with Ms. Jarosz's lawyer ahead of time, and even though Ms. Jarosz's lawyer had filed a confirmation form stating that he *had* conferred with opposing counsel about the issues, materials, and time estimates, it turned out that Ms. Jarosz's lawyer had not actually discussed the motion with Mr. Denda's lawyer before they attended court to argue the motion:

> [9] The motion confirmation form requires parties to indicate whether they have conferred in advance of the motion. For this motion, both lawyers indicated on this form that they had conferred with opposing counsel regarding the issues, motion material and time estimates. This was not accurate. **[Ms. Jarosz's lawyer], when asked by the Court, confirmed that he did not speak with [Mr. Denda's lawyer] about the specific disclosure he sought on this motion. [Mr. Denda's lawyer], when asked by the Court, advised that she attempted to call [Ms. Jarosz's lawyer] twice to discuss this motion.** She further indicated that she was away for periods in July 2024, but nonetheless exercised efforts to address this motion, respond to outstanding disclosure, and respond to [Ms. Jarosz's lawyer].
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> [10] From what I was told and from the motion materials, **it appears [Mr. Denda's lawyer] attempted to have productive communications and be responsive to the disclosure requests. [Ms. Jarosz's lawyer] chose, instead, to send lengthy emails and letters that were accusatory, hyperbolic, and not resolution oriented.** [emphasis added]

The content and volume of the materials, combined with the lack of discussion between counsel was, to use the words of Justice Sharma, "a good example of what family lawyers ought *not* do", as "[i]t represents a lack of appreciation of what a judge can reasonably be expected to do in a 1-hour motion", "exemplifies poor written advocacy", and "underscores the importance of cooperative and positive professional relationships between opposing counsel."

Having practiced family law for many years, the type of conduct described by Justice Sharma is nothing new. It has been a problem for at least the last several decades. That said, it does seem to be getting worse by the year.

When do cases get settled and issues get resolved? When both counsel are thinking about and discussing the same file at the same time. And the time to do that is not when a motion starts.

However, there are other parts to this problem — one comes down to the resources devoted to the justice system. When, in some jurisdictions, a long motion cannot be booked within a reasonable timeframe (in some court sites, long motions dates are not available for eight months or more), is it really a surprise that some counsel will try to squish a complicated motion onto a regular motions list — especially when many courts do not uniformly or consistently enforce the rules? Some matters cannot wait for months . . . and months . . . and months.

Then, there is the all-too-common problem of some counsel acting like arsonists rather than firefighters, drafting needlessly aggressive and inflammatory correspondence and court materials, engaging in procedural and tactical chicanery, and refusing reasonable requests for indulgences.

This decision should serve as a wake-up call to lawyers and litigants that our courts just are not going to tolerate this type of conduct in family law cases anymore. While Justice Sharma's decision was only released recently, it has already been relied on in at least one other case — *Johal v. Johal*, 2024 CarswellOnt 13347 (S.C.J.) — where Justice Agarwal was asked to hear a disclosure motion on a regular list where the moving party had filed a **42 page** Notice of Motion with **84 requests** for information and a **37 page** affidavit. As his Honour explained in his decision:

> [15] **Justice Sharma recently discussed what lawyers "ought not to do" on a disclosure motion. See *Jarosz v Denda*, 2024 ONSC 4597, at paras 3-11. Much of his guidance could apply to this motion.** I repeat and expand on two of those directions.

> [16] First, the refusals and undertakings chart (Form 37C) is a useful template for a disclosure chart. Parties can also refer to model Redfern Schedules available online. In short, **the moving party should list the document requested and the relevance or reason for the request. The responding party should, on the same document, state its response, including any legal objection. This document should have a column for the court's decision. This document should be the main tool used at the oral hearing — both parties should hyperlink the chart to the evidence filed on the motion.**
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> [17] Second, **the parties have to communicate about the motion long before the hearing and in real-time, rather than trading warring briefs at the absolute last minute allowed under the *Family Law Rules*.** This motion is a good example. [The husband] didn't tell [the wife] exactly what she was moving for until eight days before the motion. [The wife] then ignored most of the requests and, for the first time in the eight months since questioning, honoured his undertakings. Unsatisfied by [the wife's] answers, [the husband] simply filed a reply brief.
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> [18] **I appreciate that discovery motions can be highly adversarial.** The moving party is frustrated by the responding party's alleged lack of disclosure. The responding party is irritated that they're being accused of hiding something. Both parties are put to, in their view, unnecessary legal expense to litigate the issue. The motion inevitably delays the conclusion of the proceeding. **But, as this motion shows, the failure of the parties (or their lawyers) to rise above these hard feelings to litigate the motion efficiently causes more delay and cost.** [emphasis added]

While Justice Agarwal's comments about how the motion was handled are not nearly as "pointed" as Justice Sharma's, they are still not what counsel wants to read. Interestingly, however, after expressing their concerns about how the motions before them ought to have been handled, both Justice Sharma and Justice Agarwal nevertheless *still* proceeded to hear and decide at least some of the issues before them. While they presumably did so to help ensure that the cases before them could move forward and to prevent the time they had already spent reviewing the materials from going to total waste, perhaps the better course of action would have been to just dismiss the motion without prejudice to it being brought back on proper materials after counsel discussion and, if necessary, as a long motion. If lawyers know that courts will not allow motions that will clearly require more than an hour to argue to proceed on a regular list, it will stop. As we have said before, bad behaviour tolerated is bad behaviour encouraged.

That being said, to those judges out there — or to those who may be judges — we ask that you remember that the practice of family law is difficult and the vast majority of lawyers (like the vast majority of judges) are just trying to help move the matter forward.

Now Boarding. AC Flight 1072 to Pakistan . . . Sorry . . . Your Flight Has Been Cancelled

***Badar v. Danish*, 2024 CarswellOnt 10878 (S.C.J.) — Ramsay J.**

This case involved a Wife's request to travel with the parties' seven-year-old child, I.D., to Pakistan. The Husband vehemently resisted the trip, claiming that it was just a pretense to abscond with the child to Pakistan or Saudi Arabia.

The parties were married in Pakistan in 2013. They separated on March 1, 2023. They had one child together and were involved in a high-conflict family law proceeding involving both the Children's Aid Society ("CAS") and the police. Both parties alleged that the other had engaged in physical violence.

The Wife brought a motion permitting her to travel to Pakistan with the child for 21 days. She wanted to attend her sister's wedding. The Husband argued that the Wife would not return with the child. At times he also made submissions that the Wife would relocate to Saudi Arabia, which were apparently based on an experience that his brother had in his separation.

There were a number of important evidentiary issues in this matter:

- The Husband sought to rely on statements purportedly made by the child to third parties in his Affidavit materials.

• The Wife sought to rely on a letter from the CAS which also contained statements that the child made without calling the author of the CAS letter.

• The Husband sought to rely on an Affidavit he obtained from a lawyer in Pakistan named Raheena Khan. In her Affidavit, Ms. Khan stated that she had been asked by the Husband to provide "insight on the state of law and *Hague Convention* in Pakistan."

Hearsay Evidence of the Child

The most basic rule of evidence is that it is admissible if it is relevant, material and not the subject of an exclusionary rule: *Enns v. Goertzen*, 2019 CarswellOnt 12392 (S.C.J.); *Propp v. Propp* (2014), 38 R.F.L. (7th) 276 (Sask. C.A.). Even improperly obtained, is *prima facie* admissible: *Grech v. Scherrer*, 2018 CarswellOnt 20270 (S.C.J.); *Garrett v. Oldfield*, 2014 CarswellOnt 908 (S.C.J.) at paras. 29-34.

Justice Ramsay followed suit. She set out that evidence is admissible if the trier of fact is legally permitted to consider it (i.e. that it is not the subject of an exclusionary rule). The corollary is that evidence the law does *not* permit to be considered is *inadmissible* — even if it is relevant and material: *Parliament et al v. Conley and Park*, 2019 CarswellOnt 11523 (S.C.J.) at para. 17.

Hearsay evidence, being the subject of an exclusionary rule, is presumptively *inadmissible*. Absent the consent of the parties, hearsay can only be admitted under a statutory exception, a common law exception, or if the evidence falls under a traditional exception to the hearsay rule. Today, hearsay evidence is only admissible if it meets the tests of necessity and reliability: *R. v. Bradshaw*, 2017 CarswellBC 1743 (S.C.C.); *R. v. Khelawon*, 2006 CarswellOnt 7825 (S.C.C.); *R. v. Starr*, 2000 CarswellMan 449 (S.C.C.); and *R. v. B. (K.G.)*, 1993 CarswellOnt 76 (S.C.C.).

While Rule 14(18) of the Ontario *Family Law Rules*, O. Reg. 114/99 *permits* a party on a motion to swear affidavit evidence based on information and belief, it is admissible only if the source of the information is identified and the affiant confirms their belief that the information is true. It does not *require* the court to rely on hearsay evidence, particularly if it is improper hearsay.

In his Affidavit, the Husband included statements which other people (family members) told him that the child told them. That is not hearsay; it is *double* hearsay (swearing to what someone told somebody else). Justice Ramsay correctly identified these statements as double hearsay. The Wife argued that these statements were inaccurate and/or that the child was coached. There was also no evidence as to the reliability of this hearsay evidence. Justice Ramsay also pointed out that the evidence, were it to be allowed, squarely put a seven-year-old-child in the midst of a contentious dispute between their parents. Justice Ramsay completely rejected this evidence, as she should have. Double hearsay is just too far removed.

The CAS Letter/Report

The court then considered the CAS letter. The CAS wrote a closing report/letter on July 3, 2024. The letter contained allegations that the Wife had slapped the child (they found no evidence of that) and conversations between the author of the letter and the child about how he felt about going to Pakistan and why. The letter relayed the author's view that the child had been coached to say that the Wife had slapped him and that he would be abducted in Pakistan. The author further indicated that the child told them that he did not actually believe that the Wife would keep him in Pakistan.

The Wife argued that the letter should be admitted as an exception to the hearsay rule as a business record under the Business Records Exception. The Husband strenuously objected.

Ultimately the letter was determined to be inadmissible for three reasons:

1. The letter was attached to the Wife's Affidavit as an exhibit and was hearsay. The Wife did not have an Affidavit from the author of the letter;

2. There was no evidence that the letter was, in fact, a business record;

3. Even if the letter was a business record, that would not make the double-hearsay statements in the letter *prima facie* admissible — there would still have to be evidence as to their reliability and necessity. The Business Record Exemption may allow for certain limited forms of double hearsay, such as statements made by and recorded by two people who are each acting in the ordinary course of business. Though those statements may ultimately be accorded very little weight.

That said, there does appear to be some confusion in the law as to whether double hearsay is allowed in a business record: compare *Bruno v. Dacosta*, 2020 CarswellOnt 13621 (C.A.) (some double hearsay allowed) and *CAS v. J.U. and B.P.-M.* (2020), 42 R.F.L. (8th) 373 (Ont. S.C.J.) (no double hearsay allowed).

Justice Ramsay set out that an unsworn letter tendered for the truth of its contents is hearsay. Further, the closer those facts come to the dispositive issue, "the closer scrutiny the letter or report deserves, including submitting to meaningful cross-examination." [See *Isakhani v. Al-Saggaf* (2007), 40 R.F.L. (6th) 284 (Ont. C.A.) at paras. 37-39; *Ceho v. Ceho*, 2015 CarswellOnt 13194 (S.C.J.) at para. 50]. In this case, the letter dealt with the precise issue at question on the motion. Without an Affidavit from the author, there was no evidence as to the reliability of the hearsay statements contained within the letter. It was inadmissible.

Justice Ramsay also concluded that the letter was not a business record as defined by s. 35 of the Ontario *Evidence Act*, R.S.O 1990, c. E. 23 (the "*Evidence Act*"). Rather, the authenticity and content of the letter could only be proven by the author of the letter themselves.

Finally, Justice Ramsay set out that s. 35 is not a proper basis for admitting statements in business records. Statements contained in business records are not *prima facie* evidence of any act, transaction, occurrence or event described in the record. Even if the letter was a business record, s. 35 would not permit a court to just accept the statements contained within it as fact. They still had to be proven.

There is also some disagreement on the question of whether CAS reports are properly the subject of the business records exception: *Children's Aid Society of Toronto v. L. (L.)* (2010), 83 R.F.L. (6th) 431 (Ont. C.J.); *Avakian v. Natiotis*, 2012 CarswellOnt 11779 (C.J.); *Minister of Community Services v. C.C., R.M.*, 2017 CarswellNS 888 (S.C.); *CAS v. J.U. and B.P.-M.* (2020), 42 R.F.L. (8th) 373 (Ont. S.C.J.); *D.D. v. CAS (Toronto)* (2015), 71 R.F.L. (7th) 277 (Ont. C.A.); *CAS (Toronto) v. G.S.* (2018), 5 R.F.L. (8th) 464 (Ont. C.J.).

In *Catholic Children's Aid Society of Toronto v. Jean L. and Willard R. (No. 3)* (2003), 39 R.F.L. (5th) 54 (Ont. C.J.), the court suggested that in considering the question of hearsay within business records, in addition to the "usual" test for the admission of business records (that the record was made in usual and ordinary course of business; that it was in the usual and ordinary course of business to make the record; the record was a contemporaneous or reasonable recording; the record contains only facts and not opinions; and the person recording did so under a business duty), the court must also consider whether the source of the information was under business duty to make the statements or whether the statements are otherwise admissible under a hearsay exception.

Ultimately, s. 35 of the *Evidence Act* — the statutory business records exception — was not meant to "open the floodgates" to permit the admission of otherwise inadmissible evidence simply because it has been recorded in a business record: *Catholic Children's Aid Society of Toronto v. J.L.* (2003), 39 R.F.L. (5th) 54 (Ont. C.J.).

The Evidence of Ms. Khan

The Wife objected to the evidence of Ms. Khan (the Pakistani lawyer). She argued that Ms. Khan was providing opinion evidence without complying with the requirements of Rule 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Justice Ramsay agreed with the Wife that Ms. Khan's evidence was opinion evidence — she was providing evidence on the law of Pakistan

and the *Hague Convention*. Questions of foreign law are treated as questions of fact that must be proven by testimony of a properly qualified expert.

However, there was no need to resort to the *Rules of Civil Procedure*. The *Family Law Rules* contain a provision dealing with expert reports — Rule 20.2. Ms. Khan's Affidavit did not comply with the Rule, as she had not delivered a report, or an acknowledgement of the expert's duty as required by Rule 20.2(2). That requirement is mandatory. The evidence was inadmissible.

Risk of Abduction

Justice Ramsay then considered whether there was a plausible risk that the child would be abducted. While she rejected the Husband's claims based on the double hearsay evidence, she did acknowledge that there was a plausible risk based on the fact that, while Pakistan is a signatory to the *Hague Convention*, Canada does not recognize it as such. The Husband also relied on a warning on the Government of Canada's Travel Advisory to Pakistan (the "Travel Advisory") which advised that Canada does not recognize Pakistan as a signatory to the *Hague Convention*.

When considering a child's travel, courts are often comforted when the travel involves a Hague signatory: See, for example, *Geliedan v. Rawdah* (2020), 38 R.F.L. (8th) 261 (Ont. C.A.) at para. 37; *Zafar v. Azeem* (2024), 97 R.F.L. (8th) 3 (Ont. C.A.) at para. 40. However, those warm fuzzies do not apply to Pakistan. In this instance Pakistan was effectively a non-signatory because Canada has not acknowledged Pakistan's accession to the *Hague Convention*.

Justice Ramsay set out that travel to a non-*Hague* country in cases where there is significant conflict between the parties requires caution. In this case, there had been accusations of assault, and sexual assault, and the Husband claimed that at one point he had been kidnapped and held at gunpoint by the Wife's family.

The Wife argued that she had strong ties to Canada. She had lived in Canada for the past nine years and was a dual Canadian and Pakistani citizen. She had gone to Pakistan in 2021 with the child and returned. She worked part-time in a law office and had just renewed her lease on a rental home. However, there was also evidence that the Wife had expressed frustrations about living in Canada. The Wife acknowledged those comments, though she stated that they were not unusual for new immigrants. Her family ties were in Pakistan, and she had property there although the parties were in dispute as to whether it was multiple properties or an empty plot of land.

Risk of Danger

The court then considered whether there was a risk of danger to the child in Pakistan. Both parties consented to the court taking judicial notice of the Travel Advisory (had they not, it is likely the Official Government of Canada Travel Advisory *may* have been admissible pursuant to the common law or statutory public documents exception to the hearsay rule: *J.N. v. C.G.* (2023), 83 R.F.L. (8th) 4 (Ont. C.A.)). The Wife argued that the Travel Advisory only warned against traveling to specific areas of Pakistan, where she was not intending to travel with the child. However, she failed to deal with the fact that there was a general portion of the Travel Advisory that did reference political instability and that security forces were on high alert in several areas she was traveling. The general section warned travelers that the security situation was "evolving and remained unpredictable." The Travel Advisory was updated three days after the motion warning individuals to exercise a "high degree of caution" in traveling to Pakistan on account of unpredictable security situations, the threat of terrorism and civil unrest (among other things). Certain regions had an unequivocal warning for Canadians to avoid all travel.

When the court requested the parties provide submissions on the updated Travel Advisory in writing, the Wife again set out that the regional warnings did not apply to the areas she intended to travel.

Ultimately, Justice Ramsay determined that it was not in the child's best interests to travel to Pakistan. The risk to the child's safety and security coupled with the lack of assurances that if the child was not returned, the Husband could avail himself of a process to facilitate his return was of great concern to the court. The risk of the child not returning, in the context of a very

contentious proceeding without the parenting issues being finalized, outweighed the benefit to the child. The court noted that the child did not speak the language and would be essentially "tagging along with his mother to her sister's wedding." Not this time.

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