FAMLNWS 2024-42
Family Law Newsletters
November 4, 2024

— Franks & Zalev - This Week in Family Law

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"Hey Siri — Please Delete All My Incriminating Text Messages" — Part Two

***R.D.R. v. K.D.N.* (2024), 1 R.F.L. (9th) 396 (Sask. K.B.) — Goebel J.**

Issues: Saskatchewan — Admissibility of Surreptitiously Obtained Text Messages

My son recently showed me a photo on his iPhone of me standing on top of the guard rails of the Golden Gate Bridge in San Franciso. There are two problems with this. First, I've never been to San Franciso. Second, I'm afraid of heights. But there I was — nevertheless — standing on the guard rails. My son no longer has an iPhone; I gave him a pad of paper and a pencil.

The proliferation of smart phones now equipped with some form of artificial intelligence and other forms of advanced recording and tracking technology has been accompanied by an exponential increase in litigation about the authenticity and admissibility of surreptitiously obtained recordings and text messages. What Justice Vogelsang described as an "unfortunate trend" more than a quarter century ago in *Tatarchenko v. Tatarchenko*, 1998 CarswellOnt 4374 (Ont. Gen. Div.) at para. 5 is now an epidemic that has been described by various judges as, among other things, "dangerous" (see e.g. Justice Kurz's decision in *Van Ruyven v. Van Ruyven* (2021), 62 R.F.L. (8th) 451 (Ont. S.C.J.) at para. 40), "odious" (see e.g. Justice Howard's decision in *Paftali v. Paftali* (2020), 46 R.F.L. (8th) 1 (Ont. S.C.J.) at para. 54), and "repugnant" (see e.g. Justice Turcotte's decision in *Heimlick v. Longley* (2022), 71 R.F.L. (8th) 454 (Sask. Q.B.) at para. 21). So many adjectives!

We discussed one case about this problem — *D(SJ) v. P(RD)* (2023), 87 R.F.L. (8th) 210 (Alta. K.B.) — in Part One of "Hey Siri" (see the May 29, 2023 (2023-21) edition of *TWFL*). In that case, Justice Leonard had to decide whether to admit text messages that clearly showed the father was hiding income, but that the mother had obtained through surreptitious means (she acquired them by accessing an old cell phone that the father accidentally left in a vehicle that was in the midst of being repossessed).

Although Justice Leonard criticized the mother's improper conduct and expressed concerns about whether admitting the evidence might encourage other litigants to engage in similar antics, she ultimately concluded that the probative value of the surreptitiously obtained text messages was sufficient to outweigh the prejudicial effect on the administration of justice of sanctioning the mother's invasion of the father's privacy. Or, to put it in slightly more cynical terms: the surreptitious evidence in *D(SJ)* was just too juicy to exclude, especially since the mother's conduct, while not great, could have been worse. Generally, despite initial judicial protestations every time the issue arises, it does seem that *good* evidence will be excluded as dangerous, odious or repugnant; but *great* evidence will be admitted.

In the present case, *R.D.R.*, the court was faced with a similar situation. However, as discussed further below, the presiding judge, Justice Goebel, was of the view that the improper conduct in *R.D.R.* was significantly worse than the conduct in *D(SJ)*,

and that the text messages were far less important. Accordingly, she refused to admit them. That is, the evidence was good — but not great so as to warrant the court holding its nose and admitting it.

The parties in *R.D.R.* were common law spouses. They had two children together aged five and three years old when the parties separated in 2017. Although several interim orders were made after the parties separated, the litigation was never resolved on a final basis. Instead, the parties settled into a *status quo* that was largely based on the interim orders, and they moved on with their lives. This meant, among other things, that the children lived primarily with the mother in Rosthern, Saskatchewan, and spent weekend and holiday time with the father at his home in St. Louis, Saskatchewan, which is about a 45-minute drive from Rosthern.

In September 2023, the mother and her new partner moved from Rosthern to Saskatoon, which added another 45 minutes to the drive between the mother's and father's homes. While the father wasn't happy about the move, he did not do anything to prevent it.

Unbeknownst to the father (as the mother did not tell him), shortly after the mother and children moved to Saskatoon, the mother's mental health deteriorated, and she started abusing alcohol and recreational drugs. In late October 2023, she overdosed on anti-depressants and sleeping pills. Fortunately, the mother quickly recognized that she had a problem, and took appropriate steps to get help. She started attending narcotics anonymous, alcoholics anonymous, and regular counselling sessions, and abstained from using alcohol or drugs.

While it is great that the mother addressed her problem — not so great that she hid the problem from the father.

In December 2023, the children went to the father's home in St. Louis for Christmas. They were scheduled to return to Saskatoon on January 6, 2024. However, while the children were at the father's home, he discovered he could access the mother's text messages on the children's iPad. The father then read and screenshotted the mother's private text messages about her recent substance abuse and mental health problems, as well as her hospitalization.

Operating under the common misconception that two wrongs do, indeed, make a right, upon discovering the mothers' recent difficulties, the father did not tell the mother that he had accessed — and was continuing to access — her private text messages. Instead, he sent her a text message accusing her of using drugs around the children, and advising her that he had already contacted the RCMP, child protective services, and his lawyer. And, instead of returning the children or bringing an urgent application to deal with the situation, the father simply registered them for school in St. Louis and refused to return them to the mother.

It took the mother time to find a lawyer and to file an application to compel the father to return the children to her care, but she eventually did so, and her materials were filed with the court in early March 2024. In the meantime, the father continued monitoring her private text messages with reckless abandon.

Shortly after the mother filed her application, the father brought an application of his own to have the children placed in his primary care.

Both parties' applications were heard by Justice Goebel, who recognized that before she could decide what to do about the interim parenting arrangements, she first needed to decide whether to admit the surreptitiously obtained text messages the father was looking to have admitted as evidence.

After reviewing some of the caselaw about the admissibility of surreptitiously obtained evidence in family law, Justice Goebel proposed the following test for determining whether a particular piece of surreptitiously obtained evidence should be admitted: the party seeking to rely on improperly obtained evidence must satisfy the court that the proposed evidence is authentic, unaltered, relevant, and sufficiently probative to outweigh any prejudicial effects. Not a bad test, and certainly more intellectually honest than, "this is an odious, repugnant practice . . . but whatcha got?"

To this we would add that the proposed evidence also must not be subject to an exclusionary rule: *R. v. Schneider*, 2022 CarswellBC 2747 (S.C.C.) at para. 46. For example, an out of court statement by a non-party who is not called to give evidence

at trial does not somehow become admissible because it was recorded — the out of court statement is still hearsay, and is only admissible for the truth of its contents if the party seeking to rely on it establishes that one of the exceptions to the rule against hearsay applies. (That said, a recording would go a long way to avoid the classic hearsay dangers of the declarant's perception, understanding, memory, and sincerity.)

Therefore, Justice Goebel suggested that surreptitiously obtained recordings or text messages should be admitted only if the party seeking to rely on the evidence can establish that the evidence is:

> 1) Relevant;
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> 2) Authentic and unaltered;
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> 3) Not subject to an exclusionary rule; and
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> 4) Of sufficient probative value to outweigh its prejudicial effect.

[For further discussion about authenticating electronic evidence, see Justice McGee's excellent discussion about the topic in *Lenihan v. Shankar*, 2021 CarswellOnt 364 (S.C.J.) at paras. 216-222. See also our comment on *Lenihan* in the June 21, 2021 (2021-24) edition of *TWFL* — "Fake Electronic Evidence — The Iocane Powder of Matrimonial Litigation"].

In almost every case involving the admissibility of surreptitiously obtained recordings and/or text messages, the outcome will turn on the last part of the test — whether probative value outweighs the prejudicial effect. Or, to use the more cynical terminology we used above, whether the evidence is just too good to exclude.

While there is room for a great deal of discretion when a judge is considering whether evidence has sufficient probative value to outweigh its prejudicial effect, there is no question that, on the current state of the law, the bar for admission is a high one. One jurist, Justice Kurz (in *Van Ruyven v. Van Ruyven* (2021), 62 R.F.L. (8th) 451 (Ont. S.C.J.) at para. 41), has even gone so far as to find that there ought to be a presumption *against* the admission of this type of evidence that "cannot be rebutted short of evidence disclosing serious misconduct by a parent, significant risk to a child's safety or security, or a threat to another interest central to the need to do justice between the parties and children."

[Practice Tip #1: When dealing with surreptitious recordings, your job as counsel is, in large part, to assess whether the information contained on the recording is important enough to the case to warrant the significant risk that attempting to use it could irreparably taint the judge's overall perception of your client. Sometimes a tough call — but that's why you make the big bucks.]

In *R.D.R.* Justice Goebel decided to exclude the text messages because:

> (a) Many of the screenshots the father relied on were undated and incomplete, so it was not clear whether the text messages were complete and unaltered.—[Practice Tip #2: As we mentioned in Part One of "Hey Siri", there are a number of inexpensive pieces of software your client can use to download *complete* text message chains as a PDF in chorological order with dates and time stamps. This makes it much easier for you, and the judge, to review and understand them, and should help minimize concerns about whether they are authentic.]
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> (b) The mother had already admitted and provided detailed disclosure about her struggles with her mental health and substance abuse in the fall of 2023.
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> (c) While accidentally coming across the information in question was understandable, "[s]ecretly observing and capturing the private conversations of the other parent with her current romantic partner and family members is not. It is an abhorrent breach of privacy and trust." (We can add "abhorrent" to the list of adjectives.)

In other words, given the mother's admissions about her mental health and substance abuse problems and the gross and ongoing invasion of the mother's privacy, the evidence just wasn't good enough to warrant admission.

Furthermore, as the mother had acknowledged her problems and taken steps to address them, Justice Goebel was not persuaded that it would be in the children's best interests to grant the father's request to vary the longstanding *status quo* by placing them in his primary care.

We wonder whether the result might have been different if the father had taken a more mensch-like approach to the situation (for those of you not fluent in Yiddish, a "mensch" is a person of integrity and honour) by immediately telling the mother that he had accessed her texts and telling her to change her settings.

For example, had the father told the mother that he knew she was having serious problems (and how he knew) and suggested that he keep the children in his care while she got help, and she responded by denying that she had a problem, the text messages would have been far more useful, as they would have helped to prove both that the mother had problems *and* that she was lying about them. The father then could have gone to court on an urgent basis, explained the situation, and asked the court to place the children in his primary care because: (a) he had inadvertently stumbled upon clear evidence showing that the mother had a problem; and (b) the mother had lied by denying that she had a problem when he tried to address it with her directly.

While the court would still have had to decide whether to admit the text messages, we suspect that a judge would have been far more likely to let them in as they would have had greater probative value, and the circumstances surrounding how they were obtained would have appeared far less odious, dangerous, repugnant and abhorrent, than the father's actual months-long secret surveillance campaign.

Hey Siri — that's the end.

The Corporate Attribution Doctrine: Not Just for Corporate Lawyers Anymore?

***Aquino v. Bondfield Construction Co.*, 2024 CarswellOnt 15328 (S.C.C.)**

***Scott v. Golden Oaks Enterprises Inc.*, 2024 CarswellOnt 15330 (S.C.C.)**

Issues: SCC — Corporate Attribution Doctrine

These are obviously not family law cases. But they could be very useful in some family law cases. Here's why . . .

As recognized in business statutes across Canada, a corporation is a separate legal person, distinct from its shareholders and directors. This has been perhaps the most fundamental principle of corporate law going back to the House of Lords in *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.). For example, see: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 15; *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 15; *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 16(1); *Business Corporations Act*, S.B.C. 2002, c. 57, s. 30 . . . you get the idea.

But although a separate legal entity, a corporation has no mind of its own. It has no thoughts. A corporation must act through agents — real people: *Canadian Dredge & Dock Co. v. The Queen*, 1985 CarswellOnt 939 (S.C.C.).

Therefore, how can a corporation be "guilty" of anything like a crime or of intention — such as participating in a fraud or cover up or a fraudulent preference or conveyance — or of conspiring with someone to hide money?

The Corporate Attribution Doctrine provides that, in some circumstances, the actions of an individual may be *attributed* to the corporation if the individual was the directing mind of the corporation, and the actions were done within the scope of the directing mind's authority.

Given the frequency with which family lawyers must deal with corporate entities, some of which are used to merely do the bidding of the corporate principals, an understanding of the Corporate Attribution Doctrine offers an additional arrow in the quiver of possible relief against a corporation in addition to piercing the corporate veil: *Wildman v. Wildman* (2006), 33 R.F.L. (6th) 237 (Ont. C.A.).

In *Aquino* and *Golden Oaks*, the Supreme Court of Canada discusses the application of the Corporate Attribution Doctrine in the context of bankruptcy and insolvency law using a "purposive, contextual, and pragmatic approach."

In *Aquino*, the appellants (including Mr. Aquino) had stolen millions from two family-owned construction companies (the "companies") through a false invoicing scheme. Mr. Aquino was the president and directing mind of the companies.

As a result, the companies experienced serious financial difficulties, and insolvency proceedings were commenced. In those proceedings, it was determined that Mr. Aquino — and others — issued phony invoices for services that were never provided for which they were paid over $30 million.

The companies (actually the Monitors installed pursuant to the *BIA*), challenged the phony invoices. Under s. 96(1)(b)(ii)(B) of the *BIA*, a bankruptcy trustee (and under s. 36.1 of the *CCAA*, a monitor) may ask the court to review an undervalued transaction and have it reversed if it can prove the debtor's ***intent*** to "defraud, defeat or delay a creditor". A transfer is "undervalued" where it is a disposition of property or provision of services for which no consideration is received by the debtor, or for which the consideration received by the debtor is "conspicuously less" than fair market value.

The court of first instance found that the requirements of the *BIA* for a transfer at undervalue were met and ordered Mr. Aquino and his associates to repay the money taken through the false invoicing scheme. The Ontario Court of Appeal upheld the order and dismissed the appeal.

The issue before the Supreme Court of Canada was the application of the Corporate Attribution Doctrine — specifically whether Mr. Aquino's fraudulent intent could be imputed to the companies to establish the requisite intent to defeat, defraud or delay a creditor — necessary for relief under s. 96 of the *BIA*.

In *Golden Oaks*, Golden Oaks Enterprises Inc. ("Golden Oaks"), a corporation with only a single shareholder and director, Mr. Lacasse, operated as a rent-to-own residential property business in Ottawa. But Golden Oaks did not generate real revenue; it was a Ponzi scheme.

In 2013, Golden Oaks and Mr. Lacasse found themselves in receivership and bankruptcy proceedings. In 2015, the Trustee initiated legal proceedings against the company's investors to reclaim illegal interest and commissions paid to investors prior to the company's bankruptcy. The Trustee argued that there was no legal justification for these payments, and that the investors had unfairly profited at Golden Oaks' expense. In response, the investors sought to attribute Mr. Lacasse's knowledge to Golden Oaks in an effort to trigger the Discoverability Rule under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. (the "*Limitations Act*") and bar the Trustee's claim.

The trial judge allowed the Trustee's claims for repayment of interest payments. The Ontario Court of Appeal dismissed the appeal.

Again, the issue before the Supreme Court of Canada was whether the Corporate Attribution Doctrine applied to attribute to Golden Oaks Mr. Lacasse's knowledge of the payments at the time they were made, which would result in the Trustee's claims being statute-barred.

In discussing the Corporate Attribution Doctrine, the Supreme Court made the following points:

> 1. The Corporate Attribution Doctrine, imputing the knowledge of the directing mind of a corporation to the corporation itself, is an exception to the *Salomon* principle of corporate individuality.
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> 2. The Corporate Attribution Doctrine must be applied "purposively, contextually, and pragmatically to give effect to the policy goals of the law" under which the Doctrine is proposed to be applied — in these cases, in the context of insolvency law. But it could just as easily be with respect to the policy goals of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) or provincial family law legislation.

In *Aquino*, the SCC provides a clear summary of the guiding principles of corporate attribution:

> 1. As a general rule, a person's fraudulent acts may be attributed to a corporation if two conditions are met: (1) the wrongdoer was the directing mind of the corporation at the relevant times; and (2) the wrongful actions of the directing mind were performed within the sector of corporate responsibility assigned to them.
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> 2. Attribution will generally be inappropriate when: (1) the directing mind acted totally in fraud of the corporation (the "fraud exception"); or (2) the directing mind's actions were not by design or result partly for the benefit of the corporation (the "no benefit exception").
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> 3. In addition to the fraud and no benefit exceptions, courts have discretion to refrain from attributing the actions, knowledge, state of mind, or intent of the directing mind to the corporation when this would be in the public interest, in the sense that it would promote the purpose of the law under which attribution is sought.
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> 4. In all cases, courts must apply the common law corporate attribution doctrine purposively, contextually, and pragmatically. The corporate attribution doctrine is not a "standalone principle"; there is no one-size-fits-all approach. The court must always determine whether the actions, knowledge, state of mind, or intent of a person should be treated as those of the corporation for the purpose of the law under which attribution is sought. This may require the court to tailor the general rule of attribution or its exceptions to the particular legal context. Attribution may be appropriate for one purpose in one context but may be inappropriate for another purpose in another context.

Then, in *Golden Oaks*, the Supreme Court made it clear that these principles apply with equal force to one-person corporations — that is, where the directing mind is also the sole shareholder.

With these principles now clearly stated, it is not hard to see how the Corporate Attribution Doctrine might be used in addition to, or in place of, a standard claim to pierce the corporate veil in some family law situations, especially in single shareholder/director companies or in cases where private companies are closely held by family members of one spouse.

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