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Family Law Newsletters

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

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Updates from the Supreme Court of Canada

Québec (Commission des droits de la personne et des droits de la jeunesse) c. Directrice de la protection de la jeunesse du CISSS A, — [2024 CarswellQue 14819](#) (S.C.C.)

On December 20, 2024, the Supreme Court of Canada partially allowed the appeal from the Quebec Court of Appeal's decision in this case.

We discussed the Supreme Court's decision to grant leave to appeal in the September 4, 2023 (2023-34) edition of *TWFL*. As a reminder, the case involved a teenage child who was in the care of the Director of Youth Protection (the "Director") and was being treated in a rehabilitation facility that specialized in adolescents with significant mental health issues. While at the facility, the child was placed in a special unit where she was isolated and restrained.

The child and her parents filed an application in the Youth Division of the Court of Quebec (the "Tribunal") for relief under s. 91 of the *Youth Protection Act*, CQLR, c. P-34.1 (the "*YPA*"), which allows a court to make corrective orders if it determines that the rights of a child are being prejudiced.

The Tribunal found that the child's rights had been violated and made a number of corrective orders against the facility, including orders that applied to the facility *at large*, including requiring the facility to train its youth workers, educators, and intervention officers who worked in the individualized treatment units and to provide the units with access to mental health professionals. That is, the orders were not specific to the case, facts or child before the Tribunal.

The Director appealed to the Superior Court, arguing that the Tribunal exceeded its jurisdiction, and that its orders should have only applied to the particular child in issue in the case. The Superior Court judge partially allowed the appeal, agreeing with the facility that the orders exceeded the Tribunal's authority because they applied to other children and not just the particular child in issue in the case. The Superior Court narrowed the orders so they specifically applied to the child in issue.

The child, her parents, and a government agency (the Commission des droits de la personne et des droits de la jeunesse (the "Commission")) appealed to the Quebec Court of Appeal. The majority of the Court of Appeal agreed with the Superior Court's decision, but found that the Orders should have been made against the Director instead of the facility, and amended them accordingly.

The Commission appealed to the Supreme Court. The appeal raised the question of whether the legislature in enacting s. 91 of the *YPA* intended that the tribunal only be able to order corrective measures to prevent the recurrence of a situation of encroachment

for the child whose rights were encroached upon, or whether it intended that the Tribunal also be able to order corrective measures to prevent the same situation of encroachment from occurring for any other child who might be faced with it.

The Supreme Court allowed the appeal in part. Writing for the court, Chief Justice Wagner concluded that "the legislature intended to confer on the tribunal the corrective powers needed to ensure the fullest protection of the interests and rights *of the child before it*." (emphasis added) The legislature did *not* intend to "grant the tribunal the power to order corrective measures 'that transcend the case before it.'"

However, contrary to what was suggested by the Director, the Superior Court, and the majority of the Court of Appeal, Chief Justice Wagner found that it is not necessary for corrective measures to specifically mention the child's name in order for the measures to be related to the protection of the child's interests and rights. It is possible for a broad corrective measure — that corrects, for example, an institutional factor at the source of the situation of encroachment — to be a measure related to the protection of the child's interests and rights. Such corrective measures will generally have the advantage of also protecting the interests and rights of many other children in an indirect and incidental manner.

***Mehralian v. Dunmore*, 2024 CarswellOnt 19158 (S.C.C.)**

On December 9, 2024, the Supreme Court of Canada heard the appeal from the Ontario Court of Appeal's decision in *Mehralian v. Dunmore*, 2023 CarswellOnt 18892 (C.A.), with respect to the determination of habitual residence of children allegedly abducted from or withheld from a non-*Hague Convention* signatory state.

In Ontario, the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*") applies to cases in which a child has been allegedly abducted from or withheld from a non-*Hague Convention* signatory state. Section 22(1) of the *CLRA* provides that the court shall only exercise its jurisdiction to make a parenting order or contact order with respect to a child if the child is habitually resident in Ontario at the commencement of the application for the order, or the child is not habitually resident in Ontario but six other criteria are satisfied.

Section 22(2) of the *CLRA* provides that a child is habitually resident in the place where the child resided in whichever of the following circumstances last occurred: (1) with both parents; (2) if the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order; or (3) with a person other than a parent on a permanent basis for a significant period of time. Section 22(3) provides that the removal or withholding of a child without the consent of all persons having decision-making responsibility with respect to the child does **not** alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld.

We discussed the Court of Appeal's decision in *Dunmore* in the February 26, 2024 (2024-08) edition of *TWFL*. As a reminder, the parties lived together in Oman until March 2020 when they travelled to Ontario. They had planned to return to Oman in early April 2020 but the pandemic precluded them from doing so and they stayed with Mr. Dunmore's parents in Ontario until January 2021. In the meantime, Ms. Mehralian became pregnant and their son was born in Ontario in December 2020. The parties returned to Oman with their son in January 2021 but they returned to Ontario in April 2021. They then separated in May 2021. Mr. Dunmore moved to the United Arab Emirates and later Oman, while Ms. Mehralian remained in Ontario with their son.

Mr. Dunmore brought a motion in the Ontario Superior Court seeking an order returning the parties' son to Oman under the *CLRA*, which motion was dismissed (2023 CarswellOnt 6779 (S.C.J.)). The motion judge determined that it was not necessary to find that the parties had a "settled intention" to remain in Ontario in order to find that the parties' son was habitually resident there.

Mr. Dunmore appealed to the Ontario Court of Appeal and his appeal was dismissed. He then sought and obtained leave to appeal to the Supreme Court.

The thrust of Mr. Dunmore's argument at the Supreme Court was that the court's previous decision in *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.), dealing with the determination of habitual residence under the *Hague*

Convention (which does not contain a definition for habitual residence), should *not* apply in non-*Hague Convention* cases where the *CLRA* applies (which does contain a definition for habitual residence). As a reminder, in *Balev*, the majority of the Supreme Court endorsed the hybrid approach to the determination of habitual residence that is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions."

Mr. Dunmore argued that the *Balev* approach for the determination of habitual residence is inconsistent with the *CLRA* definition of habitual residence and, therefore, should not apply to non-*Hague Convention* cases.

During oral argument, the majority of the Supreme Court judges did not seem particularly concerned about the conflict between the *Balev* approach and the *CLRA* definition, which makes us wonder why they decided to grant leave in the first place. The majority of the court dismissed the appeal from the bench, with reasons to follow. Based on a few comments made during the oral argument, we suspect there will be a dissenting decision — possibly from Justices Côté and Rowe, both of whom dissented in *Balev*.

If there is anything interesting in the Supreme Court's decision once it is released, we will let you know.

Hopefully, in their decision, the Supreme Court will not opt to infect the clear definition of "habitual residence" in the *CLRA* with the uncertainty of the habitual residence approach in *Balev*. Time will tell.

Uh . . . Scrambled Please

***Aroma Franchise Company, Inc. v. Aroma Espresso Bar Canada Inc. et al.*, 2024 CarswellOnt 17813 (C.A.) — Fairburn A.C.J.O., van Rensburg and Zarnett, J.J.A.**

Issues: Ontario — Setting Aside an Arbitration Award Due to Reasonable Apprehension of Bias

As regular readers may remember from our discussion of the lower level decision in *Aroma Franchise Company, Inc. v. Aroma Espresso Bar Canada Inc. et al.* ("*Aroma*") in the May 29, 2023 (2023-21) edition of *TWFL*, the case dealt with the scope of an arbitrator's obligations to disclose information to parties to an arbitration, and whether and when a breach of those obligations could give rise to a reasonable apprehension of bias.

The basic facts of the case for our purposes are as follows:

1. Seventeen months into a commercial arbitration that ultimately took 2 ¹/₂ years to complete, counsel for one of the parties ("Party One") asked the arbitrator to arbitrate another unrelated matter that did not involve the same parties or issues as the *Aroma* case.
2. The arbitrator accepted the new mandate from counsel for Party One, but did not tell the other party ("Party Two") that counsel for Party One had asked him to arbitrate another matter, or that he had agreed to do so.
3. After the arbitrator released his final award awarding \$10 million in damages to Party One, Party Two found out about the second engagement, and commenced an application to set aside the arbitrator's award on the basis of reasonable apprehension of bias.

The arbitration agreement in *Aroma* expressly stated that the arbitrator had to be someone who had "no prior social, business or professional relationship with either party." This term was important to Party Two. This clause, together with correspondence showing that before agreeing to use the arbitrator, the parties had rejected three other potential arbitrators who each had varying levels of prior involvement with counsel for at least one of them, led the application judge to conclude that:

- It was very important to the parties that "the selected arbitrator not have a professional or personal relationship with either party or their counsel";

- Accordingly, even though the two arbitrations did not involve common parties or issues with significant overlap, the arbitrator should have disclosed his engagement in the second case to Party Two; and
- The failure to disclose the engagement in the second case would lead "a fair — minded and informed person, considering the facts and circumstances of this matter, [to] conclude that circumstances exist that give rise to a reasonable apprehension of bias."

As a result, the application judge set aside the arbitrator's award, and directed the initial arbitration, which as previously noted had taken 2 ¹/₂ years to complete, to be reheard by a new arbitrator.

In our discussion of the application judge's decision, we expressed the view that "[c]onsidering the importance to the parties of an arbitrator that had no prior involvement with either party or counsel, this was a situation the court could not permit to stand", and that this result seemed "obvious."

CRACK SPLATT. CRACK SPLATT.

What is that, you ask? That is the sound of large eggs hitting our faces in November 2024 when the Ontario Court of Appeal released its decision from Party One's appeal. According to the Court of Appeal, the result that we characterized as "obvious" was entirely incorrect, largely because "the correspondence [rejecting other potential arbitrators who had prior involvement with counsel for at least one of the parties] said to reveal what was important to the parties about who could and could not be, or continue as, the arbitrator, was never shared with the Arbitrator." Good point. Outsmarted by Justice Zarnett yet again.

As Justice Zarnett explained in the Court of Appeal's comprehensive reasons:

[89] **On the question of whether the Arbitrator failed to make legally required disclosure of a matter that would likely raise a justifiable doubt about his impartiality, correspondence that the Arbitrator was not reasonably aware of cannot be germane.** As this court asked rhetorically in *Rando Drugs Ltd. v. Scott*, 2007 ONCA 553, 86 O.R. (3d) 641, at para. 36, leave to appeal refused, [2007] S.C.C.A. No. 494, citing *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* [2000] Q.B. 451, [2000] 1 All E.R. 65 (Eng. C.A.), at para. 55: **"How can there be any real danger of bias, or any reasonable apprehension or likelihood of bias, if the judge does not know of the facts that . . . are relied on as giving rise to the conflict of interest?"**

.....

[91] To be sure, by not providing that correspondence to the Arbitrator, the parties did not reduce their rights to disclosure from the Arbitrator below what the objective test required of him. **The Arbitrator was always bound to make the disclosure required by the objective test, whether it was more or less than what the unshared correspondence may have revealed they expected.** The point is that based on the legal regime they chose for the arbitration, the objective test determined what disclosure was necessary by the Arbitrator. **The parties' decision not to select the IBA Guidelines as the legal regime for their arbitration, and not to share with the Arbitrator the correspondence that revealed their subjective disclosure expectations, could only be taken to mean that they could expect, from the Arbitrator, the disclosure legally required under the objective test — nothing less, but nothing more.** [emphasis added]

Having found that the application judge erred in relying on the parties' subjective intentions, the Court of Appeal turned its attention to whether, from an objective standpoint, the arbitrator nevertheless should have disclosed to Party Two that during the course of the arbitration, counsel for Party One had engaged him as arbitrator on another matter that involved different parties and different issues.

After considering a number of English cases that have considered the scope of an arbitrator's duty to disclose, the Court of Appeal concluded that the mere fact that an arbitrator has been retained by counsel for one party to arbitrate another matter is not, in and of itself, sufficient to trigger a legal obligation to disclose:

[111] Without being exhaustive, **the circumstances that would tilt toward required disclosure could include an overlapping party and issues** as in *Halliburton [Co. v. Chubb Bermuda Insurance Ltd., [2021] 2 All E.R. 1175 (U.K. S.C.)]*. **They could include the fact that the new appointment brings the total appointments to the critical mass included in the Orange List. They could involve the appointment being akin to a co-counsel arrangement, as in *Aiteo [Eastern E & P Co. Ltd. v. Shell Western Supply and Trading Ltd., [2024] EWHC 1993 (Eng. Comm. Ct.)]*. **But when no such circumstances are present, the single appointment, by counsel for one party to an ongoing arbitration, of the same arbitrator for an unrelated arbitration, does not require disclosure.** It is simply the appointment of a person required, and presumed, to be impartial in the ongoing arbitration for an unrelated dispute in which they are also required, and presumed, to be impartial. **Viewed objectively, that circumstance would not be likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence.** [emphasis added]**

The Court of Appeal also explained that even *if* the arbitrator breached his obligation to disclose, the application judge erred in finding that such a breach automatically gave rise to a reasonable apprehension of bias. Instead, the application judge should have considered whether the breach gave rise to a reasonable apprehension of bias based on the longstanding test from *Committee for Justice & Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434 (S.C.C.), which requires the court to determine "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

Furthermore, when applying the test for reasonable apprehension of bias in the arbitration context, the Court of Appeal confirmed that the strong presumption of impartiality that applies to judges also applies to arbitrators, and that while "the objective nature of the test is that it is context sensitive and fact specific", the "subjective views of the parties are not relevant[.]"

After applying the correct (i.e. objective) test, the Court of Appeal concluded that "the presumption of impartiality on the part of the arbitrator was **not** displaced by his acceptance of a retainer to arbitrate a second matter that did not involve any of the parties to the [arbitration] nor any overlapping issues of significance." [emphasis added]

That being said, the Court of Appeal was also clear that the outcome in these types of cases must always be fact specific, and that its decision should not be taken to mean that it is now "open season" for arbitrators to accept, and not disclose, appointments that would objectively give rise to justifiable doubts about their impartiality.

Appeal granted. Award reinstated. Do-over averted. 2¹/₂-year arbitration saved.

For those of us who, to use the words of the late, great, Justice George Walsh, "toil in the vineyards of matrimonial discord", there are two lessons that we can — and should — take from the *Aroma* case.

First, given that the family law mediation/arbitration bar in any given jurisdiction is relatively small, when engaging an arbitrator (and unless your client is, in fact, demanding to use an arbitrator that has never had any previous cases with either counsel), include a specific clause in the arbitration agreement acknowledging that the arbitrator has almost certainly had other dealings with the lawyers involved in the arbitration (as arbitrator or as counsel), and may be engaged to arbitrate other cases for one or both of them during the course of the matter at hand, and/or may act as counsel on a case against one or both of them. In case you don't already have a precedent for this type of clause, here is a version of the one that is now being used by many family law arbitrators in Toronto:

The parties acknowledge that in the resolution of family law disputes, it is common practice to select a mediator or arbitrator from a small, specialized group of individuals. The parties agree that, if the Arbitrator was previously or is currently retained by one or both of their counsel to mediate or arbitrate other matters, or if the Arbitrator is retained by one or both of their counsel to mediate or arbitrate one or more new matters while this matter is ongoing (collectively, "Other Retainers"), any such Other Retainers:

i) Do not give rise to a reasonable apprehension of bias;

ii) Do not raise any doubt as to the Arbitrator's impartiality or independence;

iii) Do not constitute grounds for challenge or removal of the Arbitrator; and

iv) Do not permit the parties to withdraw from or terminate this Agreement.

Second, *before* recommending an arbitrator to your client, make sure to speak to your client about the strong likelihood that the arbitrator has had other matters with you or opposing counsel, or may be engaged to deal with other matters by you or opposing counsel during the course of the client's case.

Discussing these possibilities will ensure that a client who is uncomfortable with such an arrangement is given a chance to choose a different arbitrator before opting out of the court process, or to remain in the court process. It will also mitigate the risk that your client will blame you for not raising these potential issues with them in advance in case they end up being dissatisfied with how the process unfolds and/or the result they achieve.

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