FAMLNWS 2025-19

Family Law Newsletters
June 02, 2025

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

"Not a Good Succession Plan for Our Litigation System"

SUD v. SUD, 2025 CarswellOnt 2292 (Ont. S.C.J.) — Breithaupt Smith J.

Issues: Ontario — Vocational Assessments

Is a vocational assessment a recognized expert discipline such that it can form the basis of expert evidence? Do you remember cases like *Mohan* and *White Burgess*? Do you sometimes wonder if you might be better suited to a better vocation than a life in the law? If you've answered "yes" to any of these questions . . .

Expert evidence is not only regularly based on hearsay, but the evidence of a properly qualified expert is an exception to the rule that witnesses offer facts, not opinion. A properly qualified expert can offer opinions and inferences from facts.

The modern rule regarding experts started with *R. v. Mohan*, 1994 CarswellOnt 1155 (S.C.C.) and has most recently been restated in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 CarswellNS 313 (S.C.C.), the most recent governing authority as to the admissibility of expert evidence. As set out by the Supreme Court of Canada in *White Burgess*:

> [14] To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them.
>
> . . . . .
>
> [15] Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. . . . "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them"; see also *R. v. Abbey*, 1982 CanLII 25 (SCC), [1982] 2 S.C.R. 24.
>
> . . . . .
>
> [16] Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

. . . . .

> [19] To address these dangers, *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert.
>
> . . . . .
>
> [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), ... Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence".

Distilled into Rule 20.2 of the Ontario *Family Law Rules*, the principles are rooted in the concepts of impartiality, independence and absence of bias. Borrowing from *White Burgess*, an expert opinion must be **impartial**, in that it offers an objective assessment of the questions. It must be **independent** in that it is the product of the expert's independent judgment, uninfluenced by the retaining party or the outcome of the litigation. And it must be **unbiased** in that it does not unfairly favour one party over another. The "acid test" is whether the expert's opinion would not change regardless of which party retained them.

While the full test with respect to expert evidence under *Mohan* actually deals with "novel science" and speaks to the question of proffered opinions in new or emerging areas of expertise — in this case, the husband did not actually contest the concept of vocational assessments as an expert discipline. Rather, his concern was whether the proffered expert, Ms. TF, was a properly qualified expert.

Justice Breithaupt Smith dutifully applied the first three *Mohan* criteria to the discipline of vocational assessment, and concluded that:

> a. The proposed evidence was directly relevant to a matter in issue, namely whether income should be imputed to the wife for child and/or spousal support purposes;
>
> b. The evidence was beyond the scope of general knowledge of the trier of fact such that expert assistance was *necessary* (not just "helpful" — but "*necessary*"); and
>
> c. There was no exclusionary rule (beyond the standard concept that all hearsay evidence is presumptively inadmissible).

Her Honour also noted that vocational assessment reports are regularly used in personal injury litigation, noting that such reports may be "of assistance" to a court in a determination of issues relating to employment, suitability of return to the workforce and imputation of income: *Reif v. Reif*, 2021 CarswellOnt 8447 (S.C.J.); *Ziebenhaus v. Bahlieda*, 2015 CarswellOnt 9461 (C.A.). In fact, vocational assessments arguably provide the most fact-specific determination of these issues and could be seen as the "gold standard" of evidence for the imputation of income. There is absolutely no reason to distinguish their admissibility or utility between determining damages in personal injury matters and support in family matters.

The last part of the *White Burgess*/*Mohan* test requires a properly qualified expert. This encompasses not only the idea of impartiality, but also the proposed expert's qualifications and ability to speak to various issues within their discipline.

Here, her Honour had no issue with Ms. TF's duty of impartiality. First, she had signed Form 20.2 ("Acknowledgment of Expert's Duty"). Second, her impartiality was apparent in her testimony in the *voir dire* where under cross-examination she confirmed

that her task was to report based on any conclusions that she reached regarding the husband's employability and the job market at the applicable time. She had not been retained, as the husband suggested, to provide evidence supporting the wife's position that he was underemployed.

Her Honour then considered Ms. TF's expertise and the scope of proposed testimony. Here, the court had to be satisfied that Ms. TF had "sufficient skill, knowledge or experience concerning the subject matter of her expertise and that the proffered opinion would likely aid the trier of fact in reaching a just determination. This condition is satisfied if the witness possesses special knowledge 'going beyond the trier of fact.'" [*R. v. Terceira*, 1998 CarswellOnt 390 (C.A.), (aff'd 1999 CarswellOnt 4027 (S.C.C.)].

Justice Breithaupt Smith was satisfied that the assessment of the husband's vocational abilities and the conclusion regarding his employability in a defined marketplace went beyond the knowledge of the trier of fact. That is, the evidence was *necessary*.

Based on the following evidence given by Ms. TF, her Honour was satisfied that she had sufficient skill, knowledge and experience such that her testimony would be of assistance:

> a. For almost two decades, Ms. TF had worked in a counselling capacity in assisting individuals as they transition through the workforce for any number of varied reasons, including physical or mental disability, career change and later-life first-time employment.
>
> b. Ms. TF had the relevant qualifications through the College of Vocational Rehabilitation Professionals (Yes! There is a College!). Those qualifications require continuing professional education.
>
> c. In the course of securing her credentials, Ms. TF excelled through the program, and she successfully completed the program in much less than the standard time.
>
> d. In the 3 $^{1}/_{2}$ years since her career shifted from counselling to evaluation, Ms. TF had completed more than 100 vocational assessment reports (the majority connected with personal injury litigation). She was, at that time, engaged with three additional assessments for family law purposes.

Finally, her Honour addressed the husband's main complaint about Ms. TF as a proposed expert: this was the first case in which she was set to testify in court.

While this put her Honour on notice to carefully exercise her gatekeeping function, she ultimately agreed with the Alberta Court of Appeal in *R. v. Plourde*, 2017 CarswellAlta 2302 (C.A.) that "there is no rule that the evidence of a 'first time' expert cannot be accepted."

"To exclude a prospective expert on the basis that it is his or her first time testifying is not a good succession plan for our litigation system."

Ms. TF was qualified as an expert in the field of vocational assessment.

There is No Duty to Read this Newsletter in Good Faith

***Lee v. Ocean Pacific Hotels Ltd.*, 2025 CarswellBC 469 (B.C. C.A.) — Marchand C.J.B.C., Butler and Iyer JJ.A.**

***Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 CarswellQue 13563 (S.C.C.)**

***Heritage Property Corporation v. Triovest Inc*, 2025 CarswellAlta 403 (C.A.) — Slatter, Antonio and Feehan JJ.A.**

Issues: Pre-Contractual Negotiations and the Duty of Good Faith

None of these cases are family law cases, but together, they are likely the final chapter in a series of decisions that started back in 2014. And were they not at least of interest to family lawyers and judges, we assure you we would not be wasting your time.

Do you remember what you were doing in 2014? Probably not. But, at some point in 2014 you probably read the Supreme Court of Canada's decision in *Bhasin v. Hrynew*, 2014 CarswellAlta 2046 (S.C.C.) which established that all contracts (or at least those governed by Canadian law) are subject to a general organizing principle of good faith. Remember that? Of course you do.

In 2020 and 2021, that general organizing principle was further explained to include the duty to perform the contract honestly [*C.M. Callow Inc. v. Zollinger*, 2020 CarswellOnt 18468 (S.C.C.)] and the requirement that any contractual discretion be exercised reasonably [*Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 CarswellBC 265 (S.C.C.)]. You can see our comment on *Callow* and *Wastech* in the January 25, 2021 and February 22, 2021 editions of *TWFL*.

These decisions left one question open: does the general organizing principle of good faith extend to *pre-contract negotiations*? That question *may* now be answered.

The negotiation process has historically not attracted contract law scrutiny. That has generally been reserved for the law of tort in the form of claims for negligent or fraudulent misrepresentation, etc. This has generally been the case save for contracts *uberrimae fides* — contracts of "utmost good faith" — such as insurance contracts, marriage contracts: [*Saul v. Himel* (1994), 9 R.F.L. (4th) 419 (Ont. Gen. Div.), aff'd (1996), 22 R.F.L. (4th) 226 (Ont. C.A.); *Verdina v. Verdina*, 1992 CarswellOnt 1677 (Gen. Div.); *Patrick v. Patrick*, 2002 CarswellOnt 593 (S.C.J.); *Dubin v. Dubin* (2003), 34 R.F.L. (5th) 227 (S.C.J.)] but *not* separation agreements [*Horner v. Horner* (2004), 6 R.F.L. (6th) 140 (Ont. C.A.)].

Two recent decisions — one from the British Columbia Court of Appeal and the other from the Supreme Court of Canada — have now offered further clarification on this point, that is, whether pre-contractual negotiations are subject to a duty of good faith.

Lee v. Ocean Pacific Hotels Ltd.

In *Lee v. Ocean Pacific Hotels Ltd*. ("*Lee*") the British Columbia Court of Appeal finds that parties are not obliged to negotiate in good faith.

The plaintiffs in *Lee* were former employees of Ocean Pacific Hotels. They alleged that the company had misled them during the negotiations for casual employment agreements, particularly about health benefits coverage, by dishonestly withholding information about coverage under the contracts.

While the Court of King's Bench was sympathetic, the Court of Appeal ruled that the duty of honest performance strictly applies to the *performance* of an existing contract and not to pre-contractual discussions. The Court of Appeal was concerned that expanding the duty to the pre-contract stage would create disproportionate remedies for breach of contract.

In doing so, the Court of Appeal relied on several decisions from across the country that supported a similar view: *Larizza v. Royal Bank of Canada*, 2018 CarswellOnt 11406 (C.A.); *Wonderville Child Centre Inc. v. Highwood Enterprises Ltd.*, 2018 CarswellBC 2699 (S.C.); *Okanagan Equestrian Society v. North Okanagan (Regional District)*, 2018 CarswellBC 1203 (S.C.); *Power Limited Partnership v. Ontario Electricity Financial Corp.*, 2016 CarswellOnt 11192 (S.C.J.); *Doucet v. Spielo Manufacturing Inc.*, 2011 CarswellNB 227 (C.A.). [See also *Algo Enterprises Ltd. v. Repap New Brunswick Inc.*, 2016 CarswellNB 286 (N.B. C.A.).]

These cases all support the idea that the *Bhasin* duty of good faith only arises in the context of performance — and not in the context of negotiation. There is no *contractual* duty to negotiate in good faith. Rather, any misrepresentations, unfair inducements or dishonest conduct occurring in the negotiation process is adequately addressed by tort law, including the torts of negligent and fraudulent misrepresentation.

However, in allowing the appeal, the Court of Appeal did recognize that the Supreme Court of Canada has technically left open the possibility (however slight) that dishonesty in the negotiation stage *could* be sufficient to support a claim in breach of the duty of honest performance. Indeed, the Supreme Court of Canada has not *explicitly* found there is no manifestation of good faith which could apply to pre-contractual negotiations; the point was left unanswered in *Martel Building Ltd. v. Canada*, 2000 CarswellNat 2678 (S.C.C.).

The Court of Appeal was concerned that expanding the duty of honest performance to pre-contractual negotiations would expand the remedies available for breach of contract "exponentially" — and without regard for whether the defendant *intended* to induce the other party to enter into the agreement.

Given the more rigorous and multi-part tests to prove negligent or fraudulent misrepresentation (in contrast to simply proving breach of contract), this result impliedly means that it is more difficult to claim damages for pre-contract negotiations. Perhaps that is as it should be. But once parties are contractual partners, the duty of good faith kicks in, offering another route to claim damages for breach of contract.

Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan

There is one possible exception, however, that might prove to be highly applicable to family law. In *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 CarswellQue 13563 (S.C.C.) ("*Takunhikan*"), the Supreme Court of Canada suggested that there may be a duty to negotiate in good faith where the obligation to negotiate is already a contractual obligation of the parties in a current contract.

In *Takuhikan*, the Quebec Government was contractually obligated in an existing funding agreement to renegotiate with a Band Council to make financial contributions to the Band's police force. The Band Council believed that the historic funding had been inadequate — so much so that the Band was out-of-pocket significant operating costs.

The Band Council argued that Quebec breached its obligations to renegotiate the agreements in good faith because Quebec knew that their proposed budgets and funding were inadequate to effectively operate a police force. But on renewal, Quebec refused to renegotiate the contract to provide further funding.

Albeit pursuant to the Civil Code of Quebec, a majority of those in Ottawa held that Quebec's refusal to renegotiate its financial contribution violated the duty of good faith. Quebec chose to continue the relationship with the Band Council while, at the same time, refusing to revisit the police force's funding, even though it knew the police force was underfunded. And this amounted to bad faith.

The Supreme Court held that where a contract specifically provides for its renegotiation, the duty of good faith is triggered [citations omitted]:

> [109] After a contract is entered into, [translation] "[t]he obligation to negotiate in good faith may . . . have a contractual basis and flow from the terms of the contract" especially where the parties intend to renew the contract in a manner contemplated by it . . . Thus, where parties have provided through a clause that they will have to enter into negotiations, the obligation to conduct the negotiations in good faith flows directly from the contract. Pursuant to art. 1375 C.C.Q., therefore, the performance of contractual provisions that contemplate negotiation must, as with any other contractual obligation, be in compliance with the standards of good faith. A breach of good faith in negotiating a renewal contemplated by a contract may thus be a source of contractual liability.
>
> [110] Although good faith requires more than the absence of bad faith, it does not require parties to subordinate their interests to those of the other parties. It is well established that good faith does not serve to "transform the objectives of corrective justice [it is] intended to protect into a mechanism of distributive justice that would be unpredictable and contrary to contractual stability." In the case at bar, good faith does not require the parties to forsake their own interests to benefit their counterparties in the performance of the agreement. But as the Court noted in *Ponce*, "in the pursuit of their interests and the exercise of their rights, parties to a contract must conduct themselves loyally by not unduly increasing the burden on the other party or behaving in an excessive or unreasonable manner."

Why is this interesting for family lawyers? Consider the number of Marriage Contracts that call for intermittent renegotiation of terms (keeping in mind that such contracts are already *uberrimae fides*) and, more significantly, the number of *Separation*

Agreements that call for disclosure and renegotiation of child support and spousal support; or suggest that the parties will first negotiate any dispute with the assistance of counsel?

Heritage Property Corporation v. Triovest Inc.

Finally, as if on queue, the Alberta Court of Appeal has offered what may be the final piece of the good faith puzzle. In *Heritage*, the Alberta Court of Appeal considered whether the duty of good faith might exist even after the contract no longer exists — that is, when the contract has been performed and neither party has any contractual obligations remaining.

In *Heritage*, the plaintiffs owned development land in Calgary. The defendants were owners of neighbouring property and were interested in buying a small part of the plaintiff's land that was not needed for development. To develop, the plaintiff required two approvals from the city: a rezoning permit and a development permit. The parties entered into an agreement for the sale of the small parcel which, as part of that agreement, required one of the defendants to provide a letter confirming that it did not object to the rezoning. But the letter was silent about the development permit.

The parties executed the agreement; a smaller parcel was purchased; the defendant signed the letter; and the city approved the rezoning.

The plaintiffs then applied for the development permit and were successful. And that is when the zoning hit the fan.

However, other neighbouring landowners opposed the development, and they appealed the development permit to the Municipal Board. After the plaintiff rejected the defendant's offer to purchase the entire parcel of development land, the defendant joined the other neighbouring landowners in opposing the development permit. The Board allowed the appeal and revoked the development permit. The defendants then purchased the plaintiff's lands through a judicial sale process at a significantly reduced price. Nasty.

The plaintiffs sued the defendants for breach of contract, alleging a breach of the duty to exercise a contractual discretion reasonably. The claim was dismissed, and the plaintiff appealed to the Court of Appeal who dismissed the appeal, and in doing so, considered the issue through the lens of "honest performance" rather that the "good faith exercise of a contractual duty."

According to the Court of Appeal, the defendants' obligations under the agreement had already been spent by the time they opposed the development permit. In its view:

> [16] . . . The appellants argue . . . the respondents had good faith obligations at the development permit stage. As noted, we will not re-weigh the two letters to construe an obligation where the chambers judge found none. The chambers judge held the general organizing principle of good faith contractual performance could not operate to create the "new contractual obligations" asserted by the appellants: Chambers Decision at para 79. We agree. **The duty of honest performance does not take the specific obligation agreed to by the respondents — which was to provide a non-opposition letter in respect of the rezoning application — and expand it into a general obligation to not oppose the proposed development in any way or at any subsequent stage**. The duty of honest performance means that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance" of a contract: *Bhasin v. Hrynew*, 2014 SCC 71 at para 73. The development permit application, which was submitted by the appellants after the Lot 13 agreement had been performed, was not a matter directly linked to the performance of that agreement. Moreover, there was no evidence of dishonesty or intent to mislead. [**emphasis** added]

The duty of honest performance is unlikely to operate where the allegedly dishonest conduct takes place *after* the contract has been performed as opposed to where contractual rights and obligations continue to operate.

Zoned again.

End of Document