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Family Law Newsletters

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

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Better Than a Kick in the Teeth . . . But Still a Kick

Royal and Sunalliance Insurance v. Ontario Provincial Police, [2024 CarswellOnt 15311](#) (S.C.J.) — A. Kaufman J.

Issues: Ontario — Disclosure Awards Against Third Parties in Arbitrations

This is obviously not a family law case, but it deals with a question that arises in the context of arbitration all the time; and given the frequency with which parties in family law disputes choose to submit their matter to arbitration, we thought it worthy of comment.

Arbitration is governed by statute. In Ontario, family law arbitrations are governed by the *Family Law Act*, R.S.O. 1990, c. F.3; the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "Act"); and the *Family Arbitration Regulation*, O Reg 134/07 to the *Arbitration Act*.

In B.C., it is sections 19.1 to 19.22 of the *Family Law Act*, SBC 2011, c 25.

In Manitoba, it is the *Arbitration Act*, C.C.S.M. c. A120 and the *Family Arbitration Regulation*, M.R. 105/2019.

You get the idea.

But while arbitration is governed by statute, it is also a creature of contract law. An Arbitration Agreement is generally an agreement between two parties to submit their dispute to arbitration rather than to the court.

But what happens when the issue being arbitrated involves a third party — either because one of the parties needs the third party to be bound by the arbitration decision or — more commonly — because information or disclosure from a third party is required in the arbitration process.

If it is critical that a third party be bound by an arbitration award, then the answer is simple: don't arbitrate. Save for very limited circumstances, a third party, not being party to the arbitration, is not bound by an arbitral award: *Farah v. Sauvageau Holdings Inc.*, [2011 CarswellOnt 1862](#) (S.C.J.).

But where information from a third party is required, the situation is more nuanced.

In this case, Royal and SunAlliance ("RSA") was asking for a court order requiring the Ontario Provincial Police ("OPP") to disclose records from its investigation into a car accident.

On the sidelines, RSA, an insurer, was engaged in a bun fight (an insurance priority dispute) with another insurer, Certas Home & Auto Insurance ("Certas") about the car accident involving a third party who was receiving statutory accident benefits from RSA.

RSA initiated a private arbitration under the *Act*. A central issue in the arbitration was determining the vehicle's ownership (one would think that would be clear — but alas, it was not). OPP was not a party to the private arbitration.

The arbitrator issued an Award that the OPP release its investigation file, which would clarify vehicle ownership. However, the OPP refused to comply with the Award on the basis that an arbitrator cannot compel a third party to do *anything*. OPP suggested that RSA get a court order (to which OPP would not object if it included certain and standard terms).

As noted above, arbitrators obtain their authority from the arbitration agreement and cannot award relief that would bind third parties: *Seidel v. Telus Communications Inc.*, [2011 CarswellBC 554](#) (S.C.C.) at para. 39; *Metso Minerals Canada Inc. v. BBA inc.*, [2017 CarswellQue 8454](#) (C.A. Que.), aff'g *ArcelorMittal Exploitation minière Canada v. SNC-Lavalin inc.*, [2017 CarswellQue 1117](#) (C.S. Que.).

[While there are a few older cases kicking around out there that may suggest otherwise, we suggest those cases have been clearly supplanted, are not good law, and should not be followed. See, for example: *Seganfredo v. Seganfredo* (2010), [95 R.F.L. \(6th\) 364](#) (Ont. S.C.J.); *Cotisa v. Stet International*, [1999 CarswellOnt 2988](#) (S.C.J. [Commercial List]).]

However, as astutely noticed by Justice Kaufman, the *Act* allows courts to intervene in an arbitration process for specific and limited reasons. Under s. 6 of the *Act*, courts are empowered to intervene to assist in the "conducting of arbitrations."

Then, on the specific question of evidence for an arbitration, s. 29(4) provides that "the court may make orders and give directions with respect to the taking of evidence *for an arbitration* as if it were a court proceeding." [*emphasis added*]

The key question here, therefore, was whether s. 29(4) offered sufficient jurisdiction for the court to order disclosure from a third party *in advance* of an arbitration.

Justice Kaufman was of the view that it does.

Section 29(1) of the *Act* provides that a party may serve a summons issued by the Arbitrator requiring a person to attend and give evidence *at* the arbitration. This is one of the above-noted rare exceptions to the rule that an arbitrator cannot bind or compel non-parties — but the strict wording of the section makes it only applicable to attendance at the actual arbitration hearing itself, and not to pre-hearing procedures.

In contrast, s. 29(4) empowers the court to issue orders concerning the taking of evidence "for an arbitration." As found by his Honour, this language suggests that the provision is intended to cover situations where court intervention is sought to facilitate *pre-hearing* disclosure:

Court orders and directions

(4) On the application of a party or of the arbitral tribunal, the court may make orders and give directions with respect to the taking of evidence for an arbitration as if it were a court proceeding.

The Alberta Court of Appeal came to a similar conclusion in *Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands Inc.*, [2006 CarswellAlta 33](#) (C.A.) (leave to appeal refused, [2006 CarswellAlta 657](#) (S.C.C.)). There, the court held that while the arbitral tribunal itself could not compel a non-party to undergo discovery, it could request the court to issue such an order to support the arbitration.

In *Link 427 General Partnership v. His Majesty the King*, [2023 CarswellOnt 6010](#) (S.C.J.), the court refused to enforce an arbitrator's interim order that required two non-parties to attend examinations for discovery. In that case, Justice Ramsay

highlighted that an arbitral tribunal does not have the authority to bind third parties, and that s. 29(4) of the *Act* was inapplicable because the application before the court sought to enforce an interim procedural decision rather than an order pertaining to the taking of evidence.

Based on Justice Kaufman's decision here, had the application in [Link 427](#) been brought under s. 29(4) of the *Act*, *the outcome may have been different*.

While relief under s. 29(4) is clearly discretionary (the court "may"), here the court was satisfied that the requested order was appropriate. First, the evidence sought was relevant; second, the burden on the non-party was not significant; and third, providing this assistance aligns with the legislative goals of resolving priority disputes efficiently through arbitration. [For those of you not fully paying attention — that was the test!]

For similar decisions in a family law context, see: *Lafontaine v. Maxwell*, 2014 CarswellOnt 1967 (S.C.J.); and *Garnet v. Garnet*, 2016 CarswellOnt 1801 (S.C.J.).

Therefore, while courts *are* empowered to provide relief in the form of a disclosure order against a third party in the context of an arbitration — the problem remains that parties must temporarily side-step the arbitration process and head to court for the required relief. *C'est dommage*.

A Case of Better Safe Than Sorry

Tarnovean v. Collantes (2024), 10 R.F.L. (9th) 222 (Ont. C.J.) — Kapurura J.

Issues: Ontario — Permanent Restraining Orders

While many cases address interim restraining orders, *Tarnovean* is interesting because it concerns a claim for a *permanent* restraining order.

The Mother was claiming a restraining order against the Father pursuant to s. 46 of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*") and an order dispensing with the Father's consent or signature when applying for or reviewing the parties' five-year-old child's government documents. The Father sought to dismiss the Mother's claim or, alternatively, a contact and communications order pursuant to s. 28 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*").

The parties began dating in or around 2018. They lived together from June 2019 to August 27, 2020, the day the Mother alleged that the Father threatened and physically attacked her while she held their child. The Father was arrested in connection with the incident and charged with careless use of a firearm, weapon and ammunition; assault; mischief; and three counts of uttering threats to cause death or bodily harm against the Mother. During his arrest, the police seized ammunition, magazines, and three firearms — one of which was loaded. Not a great start for daddy.

The Father's bail conditions prohibited him from having direct contact with the Mother and coming within 500 metres of their house until an investigating officer confirmed that the Mother had left. The child remained in the Mother's care, and after his release on bail, the Father lived with his parents, who facilitated parenting exchanges.

On July 6, 2021, with the Mother's cooperation, the Father's charges were withdrawn, and he entered into a 12-month peace bond pursuant to s. 810 of the *Criminal Code*, R.S.C., 1985, c. C-46. The peace bond required the Father to attend and complete a PARS program and prohibited him from possessing weapons or applying for a firearm license.

On November 17, 2021, the police attended at the Father's residence. The Mother was there, and the Father was arrested and charged with assault, assault with a weapon, confinement, damage to property not exceeding \$5,000, uttering threat(s) and failure to comply with recognizance contrary to s. 811 of the *Criminal Code*. The Father's new bail conditions prohibited him from possessing any weapons, communicating with the Mother, or attending within 100 meters of the Mother's place of residence, employment, education or where she might reasonably be expected to be.

On July 22, 2024, the Father entered into a 12-month peace bond restricting contact with the Mother unless through a specified individual for parenting time, a family court order, or legal counsel. His 2021 charges were withdrawn.

The parties agreed that the Mother would have sole decision-making responsibility and primary care for the child. According to a final Parenting Order dated September 14, 2024, the Father was to pay \$300 a month in child support and was to have parenting time every other weekend from Friday after school until Monday school drop-off, with an extension on holiday Mondays and a Tuesday overnight after school. Justice Meyrick referred the outstanding issue of a restraining order to trial.

At the trial, Justice Kapurura reviewed the definition of "family violence" in s. 24(4) of the *CLRA* and set out the legal principles to apply in determining whether to grant a permanent restraining order pursuant to s. 46 of the *FLA*.

As noted by his Honour, the test for a restraining order has both objective **and** subjective components. There must be "reasonable grounds for a person to fear for his or her own safety or for the safety of the child" as evidenced by specific events. (The fact that the grounds must be "reasonable" is the objective part of the test.) Justice Kapurura emphasized the value of cross-examination at trial for the court's risk assessment, noting that "the court should be alert to the fact that parties may improve their behaviour when the eyes of the court are on them. This might not continue once the case ends." (para. 41)

The Mother testified that the Father was financially, physically, emotionally and sexually abusive toward her, which began when she was pregnant and continued after their separation. She testified that the Father had a variety of weapons and slept with a rifle beside the bed. She claimed that the Father's coercive behaviour and violent threats prevented her from commencing a family court application, required her to download an app that interfered with the tracing of phone calls in breach of his criminal conditions, and forced her to cooperate with the withdrawal of the 2021 criminal charges.

The Mother further testified that the violence began again after the Father and the maternal grandmother jointly purchased a property in 2021 (the "Thornhill Property"). The Mother claimed the Father would violate his criminal conditions. She further claimed that in late June 2022, she saw disturbing postings on the Father's social media, which caused her to be very fearful. She changed her residence, the maternal grandmother sold her interest in the Thornhill property to the Father, and the Mother had not disclosed her address to the Father since then.

The Mother indicated that the family violence had impacted her emotional well-being and mental health. She was currently on leave from work, taking medications to assist with her PTSD symptoms, and was seeing a counsellor at the Domestic Abuse and Sexual Abuse Care Centre.

The Father denied assaulting the Mother or uttering any threats to harm her. He described all complaints made by her as "false." The Father relied on the Mother's affidavit dated May 30, 2021, in support of the withdrawal of his charges, which indicated that she was not afraid of him harming her physically. He testified that the conflict in their relationship began after their child was born because of the Mother's family. He further testified that the Mother was suffering from postpartum depression and would physically assault him.

The Father agreed that the conflict between the parties began again around November 16, 2021. The Father claimed the Mother regularly visited the Thornhill property he purchased with the maternal grandmother for her work. His evidence was that despite him telling the Mother and her family not to visit the Thornhill property, they did, and the police attended on November 17, 2021, leading to his arrest.

The paternal grandfather testified in support of the Father, claiming that the Mother was not telling the truth to the court. His evidence was that while he did not observe any abuse by the Father, he did see the *Father's* injuries on occasion. He further testified that the Mother would disregard the Father's bail conditions by asking to speak with him and showing up unannounced.

Justice Kapurura had concerns with the credibility of both parties. The Mother was not credible regarding her claims of financial abuse. She was also not credible regarding the Father's breaches of bail conditions, as the evidence demonstrated her role in violating the criminal conditions and the continued conflict between the parties.

However, the Mother's evidence on the pattern of family violence against her and her corresponding fear *was* credible and reliable. The high conflict nature of her and the Father's relationship was confirmed by the multiple charges and two peace bonds, the evidence of the Father and the paternal grandfather, and the Mother's family doctor's concerns for both her and the child. While there were inconsistencies in the Mother's evidence, Justice Kapurura noted that inconsistent evidence is not uncommon for victims of domestic violence.

Justice Kapurura found that the Father *was* credible when he acknowledged the conflict in the relationship and accepted both his and the paternal grandfather's evidence that the Mother, at one point, physically attacked him. However, the Father was not credible concerning the Mother's allegations of family violence by dismissing them entirely. Further, the claims that the Father was the victim of family violence were not credible. At no point did the Father disclose any such violence to the police.

Justice Kapurura concluded that the parties' relationship was characterized by coercive behaviour and physical and emotional cycles of abuse. The family violence was serious and involved firearms, reasonably causing the Mother to fear for her safety. Further, the child had been exposed to this violence.

The Father had not taken steps to prevent further violence, and his current peace bond was set to expire in July 2025. Given the cycles of abuse that occurred and the Father's views on firearms, Justice Kapurura concluded that there was a reasonable expectation that the Father's conduct would continue without court involvement. In these circumstances, a final restraining Order was appropriate.

The Father testified that a restraining order would negatively impact his career aspirations, which required a "good character" component. He sought an order restricting both parties from attending at the other's home or place of employment pursuant to s. 28 of the *CLRA* or an order requiring the Mother to re-file her request closer to the expiration of the current peace bond with leave of the court. Justice Kapurura did not accept the Father's arguments, noting, "[i]f [the father was] serious about his career aspirations, he would have been expected to behave accordingly. The evidence does not support that." (para. 115)

The Father alleged that no incidents of violence had occurred since the fall of 2021 — almost three years ago. The Mother agreed that no incidents occurred since mid-2022 but claimed this was only because the Father no longer knew her address. Contrary to the similar argument that was accepted by the court in *G.P. v. R.P.* (2023), 92 R.F.L. (8th) 45 (Ont. C.J.) (where it was determined that a restraining order was not necessary where the last incident was years ago), here, Justice Kapurura disagreed that the lack of recent incidents suggested that a restraining Order was not warranted given that there had been no-contact conditions for that period and that the Father's good behaviour may not continue once the case ended. Rather than wait until closer to the expiry of the 2024 peace bond, his Honour determined that the court had "to send a message to the [Father] that family violence will not be condoned." (para. 116)

Therefore, after carefully reviewing all the contested evidence, Justice Kapurura issued a final restraining Order against the Father based on persistent and serious cycles of family violence involving firearms. The restraining Order will remain in effect until further order and the Father may only move to terminate the Order after three years of no incidents.

The Father also opposed any order dispensing with his consent or signature when applying for or renewing the child's government-issued documents. He argued that he always consented to travel and signed the child's passport application without incident and court involvement. The Mother admitted that the Father had never previously withheld his consent regarding these documents. Nonetheless, Justice Kapurura granted the Mother's request, noting that the Mother already had sole decision-making responsibility over the child and the fact that any communication associated with the documents could facilitate further family violence.

Accordingly, Justice Kapurura ordered that the Father's consent and signature for the child's passport, health card and any government-issued identification documents were no longer required. The Mother can apply for or renew these documents and will provide the Father with a photocopy of the new or updated document within five days of receipt.

Accordingly, Justice Kapurura ordered that pursuant to s. 46 of the *FLA*, the Father will not:

- Attend within 100 metres of the Mother's home, place of work, place of worship, or any other place he may reasonably expect her to be, with exceptions for parenting transitions at school according to the schedule and attendance at school functions with at least 48-hour notice.
 - Communicate directly or indirectly with the Mother except in accordance with the terms of the final parenting order dated September 20, 2024, and through AppClose or another parenting application. When school is not in session, the Mother may designate a third party to assist her with pick-up and drop-off arrangements for the child.
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