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Family Law Newsletters

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

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What Do You Mean, "No Adjournment"???

***Ross v. Luypaert*, 2025 CarswellOnt 4165 (C.A.) — Zarnett, Sossin and Copeland JJ.A.**

Issues: Ontario — Adjournment Requests

This is not a family law case — but it is an important case to read for those counsel that think an adjournment is "in the bag" or to be given out like candy on Halloween.

In short summary, the respondents, Sibylle DiLella ("Yonna") and Lorraine Hagen ("Lorraine"), are the litigation guardians of their incapable parents Regine Ross and Douglas Ross. The appellant, Rene Luypaert, is Yonna and Lorraine's brother. The order under appeal granted the respondents two heads of relief: an order for the sale of 82 Galt Street, Guelph (the "Galt Property"), a fully leased duplex jointly owned by Regine and Douglas Ross, and Mr. Luypaert, and a writ of possession for 114 Bristol Street, in Guelph, solely owned by Regine Ross and occupied by Mr. Luypaert (the "Bristol Property").

Litigation ensued after the respondents approached the appellant about selling the Galt Property and/or vacating the Bristol Property in order to fund their parents' continued care. Mr. Luypaert, the appellant refused.

The respondents brought an application seeking the partition or sale of the Galt Property and a writ of possession for the Bristol Property.

As the appellant did not deliver responding materials on the application, the respondents brought a motion for an order requiring the appellant to produce certain documents and records on a *peremptory* timetable and set a hearing date, also *peremptory* to the appellant. That motion was granted by Justice MacNeil (the "MacNeil Order"). The MacNeil Order also prohibited the appellant from filing responding materials if he did not do so within the time specified by the peremptory timetable. The appellant was represented by counsel at the motion, but he was self-represented at the hearing of the application before the application judge and sought an adjournment to retain counsel, and to have affidavit evidence considered by the court.

At the hearing, the appellant did not bring a motion to amend or to vary the MacNeil Order.

Mr. Luypaert, the appellant, claimed to have no knowledge of the MacNeil Order, and he told the application judge in oral submissions that he had fired his prior counsel for "performance" issues, including failing to file materials.

The application judge was not moved. He refused to consider the affidavit evidence, declined to grant an adjournment, and ordered the matter to proceed before him.

The issue we are most interested in is the alleged error in refusing to grant the appellant the adjournment he had requested.

(For those of you reading in Ontario, there is also a discussion as to when an appeal from an Order under the *Partition Act*, R.S.O. 1990, c. P.4, which is usually heard by the Divisional Court pursuant to s. 7 of that *Act*, can be heard by the Court of Appeal. But we don't want to bore the rest of the country. So have a read if you're interested.)

The Court of Appeal was of the view that the court below did not err in refusing to grant an adjournment, and the refusal to grant the adjournment did not cause procedural unfairness.

First and foremost, a court has very broad discretion to grant or refuse an adjournment, and the Court of Appeal suggested that appellate courts should be reluctant to intervene: *Graham v. Vandersloot*, 2012 CarswellOnt 815 (C.A.), at para. 5. See also *A. (D.) v. R. (J.)*, 2012 CarswellNB 225 (C.A.). Here, in refusing the adjournment, the court below did not misdirect itself, err in law, and did not fail to observe applicable principles to the point of injustice.

In declining to grant an adjournment,

... a judge may rely on a range of factors, including a lack of compliance with prior court orders, previous adjournments that have been granted, previous peremptory hearing dates, the desirability of having the matter decided and a finding that an applicant is seeking to manipulate the system by "orchestrating delay": see *The Law Society of Upper Canada v. Igbinosun*, 2009 CarswellOnt 3420 (C.A.), at para. 37. In *Igbinosun*, Weiler J.A. added an important caveat, that denying an adjournment solely because a hearing has been designated peremptory may not be appropriate; at para. 43. See also *Conway, Re*, 2016 CarswellOnt 19061 (C.A.), at para. 24.

Here, the court below did not focus on the peremptory nature of the hearing before him. The court below also referred to the "ample opportunity" that had been provided to the appellant to comply with his obligations to file responding material, that he had been represented by counsel before Justice MacNeil, and that he also had not abided by an earlier order. For all of these reasons, he determined both that he would not receive the affidavit the appellant had attempted to file, and that the hearing would proceed.

The Court of Appeal emphasized that the fact of a self-represented litigant can attract additional scrutiny so as to ensure an unrepresented party is not taken advantage of or treated unfairly: *Grand River Conservation Authority v. Ramdas*, 2021 CarswellOnt 16703 (C.A.), at paras. 17-24. In this case, however, we see no basis for the allegation that the appellant was prevented from having a fair hearing.

Here, there was no suggestion that the appellant was a vulnerable, self-represented party unable to obtain counsel or understand the obligations arising from court orders. Furthermore, it was clear that the appellant had filed a Notice of Intention to Act in Person several months prior to the hearing of the application, but had taken no steps to hire another lawyer; nor did he try to file affidavit evidence until the day before the hearing of the application. Further, while the appellant claimed not to have seen the MacNeil Order — a copy of the MacNeil Order was appended to the appellant's own Notice of Intention to Act in Person. Oops.

And, with that, the appeal was dismissed. The court below made no error and did not treat the appellant unfairly.

As we noted at the outset, there seems to be a general feeling that "everyone gets at least one adjournment." But that is patently not the case. So save your clients and save your deductible: there is no presumptive entitlement to **one** adjournment: *Dhatt v. Beer*, 2021 CarswellOnt 2805 (C.A.) (even for self represented persons who are expected to familiarize themselves with the relevant practices and procedures and respect the court process.) See also *Zwaigenbaum v. Scher*, 2010 CarswellOnt 485 (S.C.J.).

Family Law and Corporate Law — Can't We All Just Be Friends?

Chapman v. Ing (2025), 15 R.F.L. (9th) 362 (Ont. C.A.) — Paciocco, Wilson and Pomerance JJ.A.

Issues: Ontario — Unjust Enrichment

Family lawyers know family law, and corporate lawyers know corporate law. But in *Chapman v. Ing*, Justice Pomerance for the Ontario Court of Appeal shows why family lawyers should know some corporate law and why corporate lawyers should know some family law. We don't know if the lesson here is don't do business with those you're sleeping with; or don't sleep with your business partners; but there is definitely a lesson in here somewhere.

The parties were involved in the usual "on-again-off-again" relationship for several years, and to complicate matters, they were also business partners in a trucking business. They used various corporate structures to buy and sell properties. Over time, the personal relationship soured, and along with the failing of their personal relationship, the business relationship also went south. The parties then disagreed as to their entitlements — enter the Ontario Superior Court of Justice.

The appellant wanted an order for the wind up of the parties' mutual real estate and corporate assets, and the appointment of a receiver, arguing that he was entitled to 50% of the proceeds. He argued that the parties were involved in a joint family venture (queue the family law lawyers) and that he owned the properties on a "50/50 basis", regardless of title.

The trial judge disagreed. She found the parties were less intimate partners in a joint family venture, and more business partners who, from time to time, engaged in un-businesslike "activities" in a conjugal relationship. The trial judge found that to split the proceeds equally would unjustly enrich the appellant, because the value of one of the properties had significantly increased due solely to the respondent's investment of time and money. Having not contributed to the improvements, the appellant was not entitled to share in the increased value. The trial judge awarded the respondent a 100% interest in the property at issue (the "Wyandotte property") in exchange for a \$39,000 payment to the appellant, which equated to 50% of the purchase price of the building less the amount of the first mortgage.

The appellant, like most appellants, was not terribly happy. He argued there was a juristic reason for his enrichment — s. 22(3)(b) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA"). He argued that s. 22(3)(b) entitled him, as an equal shareholder in the corporation that owns the Wyandotte property, to an equal share in the property. The appellant also suggested the trial judge erred in granting a proprietary award when a monetary award would have sufficed. Lastly, he argued that the trial judge erred in valuing the remedy on a value survived basis given the finding that the parties were not in a joint family venture.

The parties first went into business together around 2007, creating a small construction trucking company. The business did well, and its success prompted them to look into buying tax sale properties together. In 2015 and 2016, they used the profits of the trucking company to buy five properties, the Wyandotte property (a 10-unit rental property), being one of them. The parties incorporated a numbered company, 1961160 Ontario Inc. ("196") to purchase and hold the property. At the time of the purchase, the Wyandotte property was vacant and had significant fire damage.

The parties had planned to turn the Wyandotte property into a business operation, but their relationship ended less than three months after the purchase.

As some separations go, after the separation, the appellant took steps that diminished the value of the trucking company. For example: he sold trucks to a friend for well under fair market value. In the meantime, the respondent transformed the Wyandotte property into a viable commercial enterprise — an apartment complex with some office and retail space for which she was the manager. The respondent prejudiced her own financial well-being by financing improvements to the Wyandotte property.

The trial judge found that the parties were in a conjugal relationship that became predominantly focussed on their business relationship and were not involved in a joint family venture. She also determined that the appellant would be unjustly enriched by the respondent's financial and non-financial contributions to the renovation and operation of the Wyandotte property.

She also held that the appropriate equitable remedy would be to require the respondent to buy out the appellant's shares in 196 Ontario Inc. as existed on the date of separation, before Wyandotte became a revenue generating asset.

The trial judge applied the often-cited factors set out in *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) and found that the parties were — just barely — involved in a conjugal relationship. It was "hanging by a thread" for much of its duration:

It is true that a strict application of many of the *Molodowich* factors does not favour a finding of a conventional conjugal relationship, and that the emphasis and perhaps main reason for the ongoing nature of the relationship became financial focussing on property investments and businesses they ran together, particularly after Ing was laid off from Citibank in 2013 and had to find a new source of income. Nonetheless, the relationship was a conjugal one even if it was hanging by a thread for much of its duration. Chapman was a presence in Ing's and the children's life albeit a very sporadic and often uncommitted one.

The trial judge — and the Court of Appeal for that matter, surely would also have taken reference to the indicia of cohabitation set out in *Kassabian v. Marcarian* (2025), 16 R.F.L. (9th) 33 (Ont. C.A.) had it been decided at the time. Notably, *Kassabian*, emphasizing an analysis "changes in the relationship" would also likely have led to a finding of cohabitation. For further consideration of *Kassabian* see our comment in the May 12, 2025 (2025-17) edition of *TWFL*.

In her analysis of unjust enrichment, the trial judge found that the appellant was enriched from the respondent's investment and efforts to improve the value of the Wyandotte property — **and therefore 196 Ontario Inc.** In the words of the trial judge, the evidence "overwhelmingly" supported the respondent's claim of unjust enrichment. The Wyandotte property, primarily through the respondent's efforts, increased in value from \$390,000 as a vacant and uninhabitable property to close to a \$1.3 million fully tenanted going concern.

In the meantime, while the respondent was improving the Wyandotte property and 196 Ontario Inc. the appellant ran the trucking business into the ground. Not only did he sell trucks to friends for below market value, but he also transferred customers to another similarly named business that he incorporated post-separation. (This is not the best way to win friends and influence judges.)

The trial judge provided the respondent a proprietary remedy on a "value survived" basis. She directed that the appellant's shares be transferred to the respondent, upon payment to him of \$39,000, which was half the purchase price of the Wyandotte property building less the amount of the first mortgage.

On appeal, the appellants challenged pretty much everything; but the most interesting argument for our purposes was the appellant's submission that he was not unjustly enriched because s. 22(3)(b) of the *OBCA* offered a juristic reason for his enrichment:

Rights of shareholders

(3) Where a corporation has only one class of shares, the rights of the holders thereof are equal in all respects and include the rights,

... and

(b) to receive the remaining property of the corporation upon dissolution.

That is, he argued that as a shareholder in 196 Ontario Inc. (which, again, owned the Wyandotte property), he was *entitled* to share in its increased value.

Notably, this was a new argument on appeal, but the court allowed it to be argued:

(1) New Argument on Appeal

[17] The appellant did not argue that the OBCA was a juristic reason in the court below. Principles of fairness usually militate against hearing new issues on appeal. The responding party may be at a disadvantage, having not led evidence on the issue in the court below. A related concern is that the record may not be sufficiently robust to permit appellate adjudication. Finally, new arguments on appeal do violence to the principle of finality. The appellate court is not a forum for revisiting tactical decisions that were unsuccessful at trial.

[18] However, like most rules, the rule against new arguments on appeal has exceptions. Exceptions arise where the concerns that animate the rule can be adequately addressed. This is one such case. There is no missing evidence. The appellant has advanced a new theory, but it hinges on the evidence that was adduced in the court below. When asked, the respondent could not identify any additional evidence that she would have led on the issue. Therefore, the respondent is not at any discernable disadvantage, and this court has what it needs to adjudicate the issue on the merits.

Then, after allowing the argument to be considered on its merits, Justice Pomerance rejected it. As it turns out, s. 22(3)(b) of the *OBCA* does *not* provide a juristic reason for an enrichment in these circumstances.

Why?

In *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.), the Supremes considered the idea of "juristic reason," commonly expressed as no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention 'unjust' in the circumstances of the case [*Kerr* at para. 40]. Regular juristic reasons include donative intent (a gift), a contract or a disposition of law.

Although, in *Kerr*, the Supreme Court of Canada confirmed that a valid statute denying recovery can amount to a "juristic reason" to deny recovery, the Court of Appeal was of the opinion that, at least in these circumstances, s. 22(3)(b) of the *OBCA* did not offer a juristic reason for the appellant's enrichment"

[23] . . . By its terms s. 22(3)(b) addresses the relative rights of shareholders of the same class vis-à-vis the corporation. **It does not purport to allocate the family law or equitable claims that one shareholder may have against the shares registered to another shareholder.** There is therefore nothing in s. 22(3)(b) that can account for the enrichment of one shareholder to the detriment of another, even if linked to their corporate dealings. **The provision is immaterial.** [emphasis added]

This is not a situation in which the statute contemplates the very enrichment that is said to be unjust. To make her point, Justice Pomerance offers a helpful example:

[24] . . . Consider, for example, the operation of the *Excise Tax Act*, R.S.C. 1985, c. E-15, considered in *Reference re Goods and Services Tax*, 1992 CanLII 69 (SCC), [1992] 2 SCR 445 ["*GST Reference*"]. It required suppliers to collect and remit taxes and to incur expenses in the process. This requirement placed a burden on suppliers and conferred a benefit on the federal government. But since it was "precisely the burden contemplated by the statute", the Act was a juristic reason that permitted the federal government to retain the benefit unless the statute itself was ultra vires: *GST Reference*, at pp. 476-77.

The point is that, sometimes, "a statutory entitlement may have to yield to equitable considerations."

And here is the part that will fill family lawyers with a sense of purpose:

[29] This is particularly so when the context involves family law litigation. In *Wildman v. Wildman* (2006), 2006 CanLII 33540 (ON CA), 82 O.R. (3d) 401 (Ont. C.A.), MacPherson J.A. was willing to pierce the corporate veil in a family law dispute, commenting that: "[t]his is matrimonial litigation, not commercial litigation", at para. 48. He went on to note that "although a business person is entitled to create corporate structures and relationships for valid business, tax and other reasons, **the law must be vigilant to ensure that permissible corporate arrangements do not work an injustice in the realm of family law**": *Wildman*, at para. 49.

[30] Relying on *Wildman in Lynch v. Segal* (2006), 2006 CanLII 42240 (ON CA), 82 O.R. (3d) 641 (Ont. C.A.), this court affirmed the **need for a flexible approach to corporate issues raised in the family law context**. Blair J.A. noted this approach to be particularly important where "the corporations in question are completely controlled by one spouse, for that spouse's benefit and no third parties are involved": at para. 36. [**emphasis added**]

If the court can pierce the corporate veil to avoid injustice in the family law context, stands to reason that it must also be able to address shareholders' rights to avoid the same injustice. Internally, the *OBCA* (as do all provincial corporate statutes) contemplates that a court can reorder the ownership of shares through the statutory remedies of oppression and winding-up. As noted by the Court of Appeal, "[s]hareholders' rights under s. 22(3)(b) are 'equal' only until a court orders otherwise."

Section 22(3)(b) and the equal entitlements of shareholders will not protect unjust enrichment in the family law context.

The appellant also argued that the trial judge erred in ordering a proprietary remedy on a "value survived" basis, but in the absence of a finding of joint family venture:

[36] Finally, the appellant contends that the trial judge erred in ordering a proprietary remedy on a "value survived" basis, in the absence of a joint family venture. While the reference to "value survived" was arguably erroneous, it does not invalidate the reasons and conclusions of the trial judge, which are otherwise unassailable.

However, to be clear, the trial judge did not err in ordering a proprietary remedy on a value survived basis absent a finding of unjust enrichment. For her to do so was perfectly fine.

A bit of unjust enrichment history . . .

Prior to *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.), a *monetary* remedy for unjust enrichment had to be valued based on "value received" (akin to *quantum meruit*) and a *proprietary* remedy had to be valued based on "value survived": *Peter v. Beblow* (1993), 44 R.F.L. (3d) 329 (S.C.C.). In *Kerr*, the Supreme Court partially did away with this dichotomy by saying that a monetary remedy could be valued based on "value survived" if the parties were in a joint family venture. But a joint family venture has never been needed to value a proprietary remedy for unjust enrichment on a "value survived" basis — that was the "starting point" before *Kerr*. So there was nothing wrong with what the trial judge did, and her reference to "value survived" was entirely appropriate.

It was open to the trial judge to find that a monetary award would be inadequate in the circumstances to address the respondent's past and continuing contributions to the Wyandotte property. A monetary award would not have adequately captured her entitlement to future proceeds flowing from the business operation that she single-handedly established. Therefore, a proprietary remedy was entirely appropriate and it was entirely appropriate to value that remedy based on "value survived."

Appeal dismissed.

Corporate law and family law, married.