FAMLNWS 2025-32

Family Law Newsletters
September 8, 2025

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

Expert Evidence: From Admissible to Dismissible in Two Easy Steps

***Sutherland v. Sutherland* (2025), 14 R.F.L. (9th) 49 (N.S. S.C.) — Cromwell J.**

Issues: Nova Scotia — Admissibility of Expert Evidence

The Nova Scotia Supreme Court's decision in *Sutherland* is unusual in family law: an expert who, at least on paper, seemed eminently qualified to give opinion evidence was nevertheless excluded at the admissibility stage and barred from testifying before the case was heard on the merits.

In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 CarswellNS 313 (S.C.C.), Justice Thomas Cromwell (no relation to Justice Aleta Cromwell, who authored *Sutherland*) underscored that trial judges are not passive conduits for whatever expert evidence parties might choose to tender. His Honour confirmed that a lack of independence or impartiality goes to admissibility, not just weight, and that judges must actively screen proposed opinion evidence before it ever reaches the trier of fact.

The Supreme Court stressed that this gatekeeping role is essential because expert evidence is highly persuasive and often difficult for a trier of fact to evaluate. Without careful scrutiny, flawed testimony can distort fact-finding, prolong trials, and unfairly prejudice a party and, in parenting cases, the children themselves.

To guard against this problem, the Supreme Court in *White Burgess* established a two-stage framework for admitting expert evidence:

1. **Stage One** — The party seeking to adduce the evidence must satisfy the *Mohan* threshold criteria: relevance; necessity in assisting the trier of fact; absence of an exclusionary rule; and a properly qualified expert.

2. **Stage Two** — If the evidence passes stage one, the judge must then undertake a discretionary gatekeeping analysis, weighing the potential benefits of admission against the potential risks.

This process, meant to be applied rigorously, is meant to ensure that only opinion evidence that is both necessary and reliable satisfied the Expert Opinion Rule. It is meant to safeguard trial fairness, maintain public confidence in the justice system, and avoid the waste of resources on flawed opinions. Yet, at least anecdotally, family courts often take a more permissive approach, admitting expert opinion evidence and leaving criticisms to go to weight. The rationale is that outright exclusion risks depriving the court of potentially useful information, particularly in parenting cases where the best interests of a child

are at stake. Exceptions are relatively rare, and usually arise only where the flaws are so fundamental that the report cannot be salvaged — most often because the expert clearly lacks the requisite qualifications.

A clear example is *Ierullo v. Ierullo* (2023), 96 R.F.L. (8th) 468 (Ont. S.C.J.), where Justice Jarvis refused to qualify a proposed expert in a family law case involving complex valuation issues. The witness was an *unsuccessful* CBV candidate with no litigation support experience, lacked the standard credentials and experience expected of a business valuation expert, and had a long-standing relationship with the party seeking to call him. His proposed evidence failed at Stage One of *White Burgess*. Justice Jarvis added that even if this Stage One conclusion was wrong, he would still have excluded the evidence under his Stage Two gatekeeping function. Allowing a questionably qualified expert to testify risked forcing the court to reconcile divergent methodologies to "jerry-rig" a valuation — a task the court was not keen to undertake.

Another example is *Aldush v. Alani* (2021), 66 R.F.L. (8th) 486 (Ont. S.C.J.), which we discussed in "How Not to Qualify an Expert" in the January 17, 2022 (2022-02) edition of *TWFL*. In that case, Justice Smith refused to admit the father's proposed UAE law expert at Stage One for several reasons. The witness had merely adopted another person's work without offering any independent analysis, and his professional background consisted of just four years as a general practitioner in the UAE, with no specialization, scholarly involvement, publications, research, relevant teaching, or professional association membership. Without the specialized knowledge or skill needed to be a properly qualified expert, he failed Stage One; and even if he had passed, his report would still have been excluded under Stage Two for being too unreliable to be of any use.

Sutherland is different because, unlike these other examples, the expert passed Stage One of the *White Burgess* test, but her report was still excluded at Stage Two.

The case was a high-conflict parenting dispute about four children aged six to 12. Both parents accused the other of undermining their relationship with the children. The father also alleged abuse by the mother, who faced two assault charges involving the youngest child (one resolved through restorative justice, the other awaiting trial).

The parties eventually agreed to a court-ordered parenting capacity assessment with a psychological component, to be completed by a neutral assessor from the court's roster. The assessor — a registered social worker with prior court qualifications — was tasked (under a consent order) with reviewing extensive records from child protection, police, restorative justice, and mental health services. This was a court-appointed, not partisan, engagement and on paper the expert appeared fully qualified for the job.

The Consent Order required the assessor to review extensive collateral materials from child protection, police, restorative justice, and mental health services. Some of this information was still outstanding, and the father expressly asked that the report not be finalized until it was received. Nonetheless, in December 2024 the assessor delivered her report without the missing records, citing concern that the assessment would otherwise become outdated. She concluded the father was alienating the children from the mother and recommended, among other things, that he receive education on alienation from a certified counsellor trained in parental alienation.

In January 2025, the mother moved to vary the parenting arrangements on a temporary basis to implement the assessor's recommendations. The father, in turn, challenged the report's admissibility on the basis of non-compliance with the Consent Order. Justice Cromwell heard a *voir dire* on admissibility in February 2025, with the assessor testifying and both parties making submissions.

Justice Cromwell began by setting out and applying the two-stage *White Burgess* test. At Stage One, she found the assessor met the threshold: the proposed evidence was directly relevant to the core parenting issues, necessary to help the court understand parental alienation dynamics and the children's needs, not subject to any exclusionary rule, and offered by a licensed social worker with prior experience conducting family assessments.

The father argued that finalizing the report without the RCMP and mental health records created a reasonable apprehension of bias and undermined the assessor's objectivity, warranting exclusion at Stage One. The court agreed that the missing records were essential, had been the focus of sustained joint efforts to obtain, and that the father's counsel had expressly requested the report not be completed without them. Nonetheless, the assessor proceeded to release her report. However, while the assessor

cited urgency in what she considered a "classical alienation" case and concerns about harm to the children and frustration with delays and the father's communications — she had made no mention of the missing materials in her report. While her methodology was otherwise sound and the underlying science not novel, the judge questioned whether she fully appreciated or could discharge her duty of impartiality and independence.

Despite these flaws, Justice Cromwell found the report *narrowly* met the Stage One threshold under *White Burgess*, citing the assessor's qualifications, her history of producing 45-60 reports for the court over the past three years, and the Supreme Court's caution (at paragraph 49) that Stage One exclusion for bias "should occur only in very clear cases" where the expert is unable or unwilling to provide fair, objective, and non-partisan evidence. Anything short of that is to be considered at Stage Two in the cost-benefit analysis.

Stage Two, however, proved fatal. While the assessor viewed her role as preventing harm to children, she failed to appreciate her actual duty was to the court, and to provide a fair, objective, and non-partisan opinion within the scope of the Consent Order. She made parental alienation findings without evidence of expertise or a clear definition, omitted key materials (including the RCMP and mental health files and the abuse allegations), disregarded the Consent Order's requirements, and failed to seek court direction when delays arose. The report was vague, lacked foundation, usurped the court's role, and reflected a fundamental misunderstanding of her expert function. Weighing its limited probative value against the serious concerns about objectivity, impartiality, and reliability, the court found the prejudicial impact outweighed any benefit and excluded it.

As a result, Justice Cromwell found that the report was inadmissible.

This result in *Sutherland* is a reminder that clearing Stage One is no guarantee of admissibility for expert evidence. Stage Two remains a meaningful, and potentially decisive safeguard against flawed expert evidence, even in the child-focused context of family law. For family law lawyers, it underscores the value of challenging reports that stray beyond their stated scope or expertise, omit critical material, or show signs of partiality. When reliability, impartiality, and adherence to court directions are in doubt, exclusion is not only permissible but necessary to protect both the integrity of the fact-finding process and the best interests of the children.

No Mooo-lah for Mooo-tual Mooo-sings

***Metske v. Metske* (2025), 16 R.F.L. (9th) 266 (Ont. C.A.) — Lauwers, Zarnett, and Pomerance JJ.A.**

Issues: Ontario — Proprietary Estoppel

So many estoppels; so little time.

In *Metske*, the Ontario Court of Appeal set aside a $405,000 proprietary estoppel award arising from a failed family farm succession plan. Although the dispute between estranged relatives over a dairy operation was not a family law case, it offers valuable guidance on proprietary estoppel in the setting of informal family arrangements, and on the evidentiary and legal rigour needed before turning "casual understandings" into legally enforceable obligations.

Martin and Roseanne had operated their dairy farm since 1993. In 2012, they decided to sell their dairy herd and quota but to keep the cash crop part of the business. Their estranged son, Tim, and his partner, Amanda, met with them, together with Tim's uncle (who was experienced in farm succession), to discuss a staged purchase of the dairy operation.

At that meeting, they discussed a plan: Tim and Amanda would buy the herd first, then later acquire the quota and land at market value, with the land purchase deferred for at least five years. The parties never discussed a land price, though Martin mentioned $2 million for the land and quota combined. No agreement was reached and financing was postponed.

Tim and Amanda left their jobs, moved to the farm, and began running the operation while paying rent for the barn, quota, and housing. They bought the herd using a $90,000 bank loan. In 2013, they applied for financing to purchase the quota, presenting a business plan that envisioned leasing 46 kg of quota before buying it for $1.12 million, with the rest of the assets to be

acquired in 2018. It was never clear what this meant for Martin and Roseanne's continued residence on the farm. In any event, the financing fell through and no further steps were taken to obtain funds from other sources.

Over the next several years, disputes erupted. The first concerned responsibility for barn and equipment repairs, which Martin and Roseanne insisted Tim and Amanda should pay. The second involved sharp criticism of Tim and Amanda's herd management. Relations soured, and in 2015, Tim and Amanda even explored leasing another farm, though nothing came of it.

There were no further buyout discussions. Prices for the quota and land remained undetermined, and the trial judge found Tim and Amanda could not have raised the necessary funds in any event.

In April 2018, after a heated dispute, Roseanne gave Tim and Amanda until the end of May to vacate the farm. They complied, selling their herd at a loss because they no longer had quota.

Later that year, Tim and Amanda sued Martin and Roseanne for $1.3 million for unjust enrichment. Martin and Roseanne denied liability and counterclaimed for $21,000 in unpaid quota rent.

The trial judge dismissed most of the unjust enrichment claims, awarding only $33,700 for the installation of a new furnace and other specific, permanent improvements. He rejected claims for, among other things, $200,000 for the premium the quota could have fetched if sold with the farm, $345,000 for the increase in value of the home farm between May 2012 and May 2018, and $189,247 for the increase in value of the dairy buildings.

The trial judge raised the issue of proprietary estoppel on his own initiative - always a potentially dangerous proposition. After inviting and receiving submissions, he concluded that Martin and Roseanne had assured Tim and Amanda they would receive the farm on favourable but undefined terms, that Tim and Amanda had relied on that assurance to their detriment, and awarded Tim and Amanda $405,000 in damages.

Martin and Roseanne appealed. Tim and Amanda cross-appealed the dismissal of the balance of their unjust enrichment claim.

Although Tim and Amanda had not included a claim for proprietary estoppel in their pleadings, the Court of Appeal did not fault the trial judge for raising it, presumably because the parties were given notice and a chance to make submissions. This safeguarded matters. As the Ontario Court of Appeal made clear in *Rodaro v. Royal Bank*, 2002 CarswellOnt 1047 (C.A.):

> [60] It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in *460635 Ontario Limited v. 1002953 Ontario Inc.*, [1999] O.J. No. 4071 (Ont. C.A.) at para. 9:
>
> . . . The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial. . . .

See also *Grandfield Homes (Kenton) Ltd. v. Chen*, 2024 CarswellOnt 4781 (C.A.) at para. 6; *Surefire Dividend Capture, LP v. National Liability & Fire Insurance Company*, 2025 CarswellOnt 6377 (C.A.) at para. 36. *H. (T.M.A.) v. G. (J.J.)*, 2010 CarswellNB 36 (C.A.); *Mazepa v. Embree*, 2014 CarswellAlta 2286 (C.A.); and *Horch v. Horch* (2017), 1 R.F.L. (8th) 1 (Man. C.A.).

Here, any fairness concern was mitigated because the trial judge expressly put the issue of proprietary estoppel to counsel and invited full submissions.

That procedural point aside, the Court of Appeal did take issue with the substantive proprietary estoppel analysis undertaken by the court below. Citing the leading case of *Cowper-Smith v. Morgan*, 2017 CarswellBC 3482 (S.C.C.), the court reiterated that proprietary estoppel requires:

> 1) A clear representation or assurance leading to a reasonable expectation of a right or benefit over property.

2) Reasonable reliance on that expectation by action or inaction.

3) Resulting detriment that makes it unfair for the promisor to renege.

While the assurance can be express or implied, it must be clear, unambiguous, and intended to be taken seriously. If the promisor holds an interest sufficient to satisfy the expectation, the court may make the assurance binding to prevent inequity.

Here, the court found three key flaws in the trial judge's reasoning:

(a) No Clear Representation. The record showed, at most, a willingness to discuss (or negotiate) a sale at market value. Price, valuation, and payment terms were never agreed, and "favourable terms" was too vague to qualify. By 2013, when financing failed, any tentative plan was abandoned. The parties' "mutual understanding" to keep talking was simply an agreement to agree, and not a legally enforceable assurance or commitment.

There was no representation or assurance to ground a finding of proprietary estoppel. For the Court of Appeal, Justice Pomerance observed that a representation or assurance is "the lynchpin of the analysis" — and without it, proprietary estoppel cannot be established.

While the Court of Appeal acknowledged that estoppel may arise, even if important details related to a transfer are missing, to be enforceable the promise "must be sufficiently clear to ground a common understanding between the parties." Being open to future negotiations is insufficient to ground a finding of proprietary estoppel unless there is an actual *assurance* that the affected property will be transferred. As noted by the Court of Appeal, "[a] promise to negotiate is, by its nature, inchoate. It might or might not result in a meeting of the minds. Unless or until it does, there is no agreement upon which a party can reasonably rely."

(b) No Reasonable Reliance. By 2013, Tim and Amanda knew they could not finance the quota. They did not disclose this, and no further succession talks occurred. Any reliance after that point rested on an expectation they knew to be wholly unattainable. The plan failed because they could not buy, not because Martin and Roseanne broke a promise.

(c) No Actionable Detriment. Without a valid promise or reasonable reliance, the alleged losses — herd sale, improvements, lost opportunities — were speculative. The court found no persuasive evidence that any alternative venture would have succeeded.

The cross-appeal also had problems. Unjust enrichment requires: (1) an enrichment; and a (2) corresponding deprivation; without (3) any juristic reason: *Moore v. Sweet*, 2018 CarswellOnt 19478 (S.C.C.) at para. 37.

The trial judge found no enrichment from farm value increases because Martin and Roseanne stayed on the property. Their later separate sale of the quota was not done to frustrate the claim. Quota value increases were due to market forces, and the rental agreement provided a juristic reason for Martin and Roseanne to keep that benefit.

The only recoverable amounts were $5,000 for the furnace and $28,700 for other incontrovertible benefits, none of which were challenged on appeal. Accordingly, the cross-appeal was dismissed.

The appeal was allowed. The $405,000 proprietary estoppel award was set aside, and damages were reduced to $31,700 after a $2,000 set-off. The Court of Appeal awarded $15,000 in appeal costs against Tim and Amanda and remitted trial costs to the Superior Court for determination by the trial judge or another judge. It is unclear why the appellate court did not decide trial costs itself, as doing so would surely have been more efficient.

Metske mirrors many family law disputes where "handshake deals" or "wishful thinking" about property or businesses agreements collapse. It underscores that proprietary estoppel demands:

- a clear, concrete promise;
- reasonable reliance; and

- proven detriment.

It also confirms that unjust enrichment claims will be confined to clear, measurable benefits. Whether in farming or family law, handshake deals without defined terms or financial feasibility are unlikely to withstand judicial scrutiny. That said, in family law cases where the facts suggest an unfair outcome but the precise legal theory is not immediately apparent, proprietary estoppel may still be worth some serious consideration. It can offer a principled framework for turning informal understandings into enforceable rights, provided the evidence clearly meets the strict requirements.