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

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We will be off next week, but will be back with our next edition on July 5th.

A Small Bite Out of *Eric v. Lola*

Laroche c. Couillard, 2021 CarswellQue 2332 (C.S.) - Bellavance J.

We don't often get the chance to comment on decisions from La Belle Province. First, our French is only *comme-ci comme-ça* - *n'est pas fantastique*. Second, in the weekly batch of cases we get from Carswell for the *Reports of Family Law*, there are only rarely cases from Quebec.

Therefore, it is our pleasure to report on *Laroche* from the Quebec Superior Court, and we offer our thanks to Caroline Harnois and Caroline Bourbonnais of the Lavery firm in Montreal - both for bringing it to our attention and allowing us to borrow very heavily from their own summary of this important case.

The parties lived together for 32 years. In common law parlance, they were "common law spouses"; in the language of Quebec civil law, they were "de facto spouses." The parties' children were adults.

The plaintiff, Laroche, was the sole owner of the family home, but left the residence while the defendant, Couillard, continued to live there. A few months later, Laroche decided to list the home for sale, and asked Couillard to vacate the property as there was an interested buyer. Couillard refused, and Laroche started an application to evict Couillard from the residence. Couillard immediately responded with a claim against Laroche for unjust enrichment.

As in the rest of Canada, the three-part test for an interlocutory injunction comprises considerations of (i) a strong *prima facie* case; (ii) irreparable harm; and (iii) the balance of convenience: *R. v. Canadian Broadcasting Corp.*, 2018 CarswellAlta 206 (S.C.C.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CarswellQue 120F (S.C.C.).

Laroche argued that he was the sole owner of the residence - end of story. Couillard, however, argued that there was, in fact, more to the story. She raised the issue of unjust enrichment resulting from the family obligations that she had had to bear, leaving her unable to work, and leaving Laroche free to invest in his successful career. She also argued that the parties had always agreed to share the assets they accumulated. She claimed it had always been clear that she was a co-owner of the residence.

On the issue of irreparable harm, Justice Bellavance did not accept that the home would lose value simply because it could not be sold immediately. Furthermore, any possible prejudice in that regard could not be described as "irreparable." Quite to the

contrary, Couillard would suffer serious and irreparable prejudice as the sale of the house before the hearing on the merits would prevent her from buying Laroche's share in the home should the Court find that Couillard was entitled to a portion of its value.

Justice Bellavance then considered the balance of convenience and concluded this also favoured Couillard. The only inconvenience to Laroche would be financial. But the inconvenience to Couillard - who had no assets or income and had multiple sclerosis - would be much more serious. She would have to move from the neighbourhood and environment in which she had lived for the past 30 years.

As a result, Justice Bellavance dismissed Laroche's claim for an interlocutory injunction to evict Couillard from the home.

According to Justice Bellavance, "the parties' family arrangement as part of a long-term, traditional, de facto union" [translation] precluded Laroche's claim to a unilateral right to make decisions about the family home. This was a significant extension of the law in Quebec - the home of "*Eric v. Lola*" - *Quebec (Attorney General) v. A* (2013), 21 R.F.L. (7th) 1 (S.C.C.) - where it was determined that a de facto spouse had no right to spousal support or property division. Allowing a former de facto spouse (without minor children) to stay in a home in which s/he had no title is very significant for the advancement of the rights of de facto spouses in Quebec.

Fake Electronic Evidence - The Iocane Powder of Matrimonial Litigation

Lenihan v. Shankar, 2021 CarswellOnt 364 (S.C.J.) - McGee J.

The parties were only married for a short time, and had a young child together who was born in 2018. The mother moved to Ontario while she was still pregnant and, since the father was American and had no legal status in Canada, he did not even have the option of joining her. The parties separated while the mother was pregnant.

Before the child was born, it was clear that the mother was a serious alienator. This was obvious from any one of the inappropriate text messages she sent the father while she was still pregnant, including:

- a. "There is a difference between a sperm donor and a father".
- b. "Absent fathers, run away fathers, don't have any rights. They should be happy if they get a minimal visitation right (if the mother is generous)."
- c. "If you are lucky you will get to see your daughter. Most likely you might not see us again".
- d. "Runaway fathers runaway grandparents don't have rights".
- e. "I am not threatening you rather challenging you openly. For all the hardship you put through now, for all the smartness you show me now I will make sure you will get it back when the baby arrives. I will show all these evidence to court and do everything to prove that you were never involved."
- f. "If you don't care for me now, you will never get to see me or the baby again. It's a challenge, it's not a threat. And your parents will never get a chance to see the baby if you don't help me now."
- g. "You made 18 weeks of my pregnancy hell. My mission is to make the next 18 years hell for you and your family."
- h. "You are irresponsible. You didn't care for me when I have gestational diabetes. And how the hell should you be allowed to see the baby once it arrives."

The child was then born - and things only got worse. As but one example, the mother sent the following email to the father in August 2020 (note the complimentary opening):

You son of bitch.

Why are you stalking me over Skype. You can watch all you want but you will not get to see [A]. You act too smart in court this is what you will get.

My husband and I were laughing at how a psycho can set himself up. We had a good time with our 2 kids we had good weeknight Friday date night we enjoyed and we're all happy. Same with your lawyer they also have a family. You are the only lonely psycho. Talk to your lawyers if you feel like [talking] to [A]. Go screw yourself for the rest of your life. I want to see you cry. You should miss [A]. I love that. We respected you and gave you access but you screwed yourself over.

Apologize to me and accept that you made a false accusation then access will continue. Otherwise you will not get any shit.

I want to see you hurt. [A] already forgot you. She loves her step father more. She calls him Daddy with so much love. You're already replaced dummy. You are too late. You are a fool who gave up your spot and now you want to come back and the spot is taken.

In addition to being an alienator, the mother was a wholly ungovernable litigant, and was represented by *11 lawyers* during the course of the proceeding.

And then, at trial, things got bad. To give just a few examples of the mother's conduct during the trial:

- At the start of the trial, the mother was represented by her 10th *and* 11th lawyers. But she never told either of them about the other, and they did not learn of each other until they met on the first morning of the trial.
- On the 5th day of the trial, the 10th and 11th lawyers withdrew from the record when they learned that some of the emails and other documents the mother had given them to introduce into evidence as part of her case were forgeries, including an altered paternity test, a forged sperm donor agreement, and a fake email exchange between the father and his counsel that purported to show that they were planning a criminal act to have the mother removed from the case.
- Over the weekend after the 5th day of trial, the mother, who until that point had been the child's primary caregiver, dropped the child off with the father, got on a plane, and flew to India, where she apparently remained for the rest of the trial.

The trial ultimately lasted for 20 days. Not surprisingly given the mother's alienating behaviour and demonstrated inability to put the child's best interests ahead of her own (to say nothing of the fact that she gave the child to the father and left the country in the middle of the trial), Justice McGee concluded that it would be in the child's best interests for the father to have sole custody, and for the mother to have access pursuant to a detailed multi-directional order.

In her comprehensive reasons, Justice McGee took the opportunity to discuss how courts should deal with electronic evidence. She explained that the party seeking to have electronic evidence admitted must establish that the document is authentic in that there is "some evidence capable of supporting that the electronic document is what the party adducing it claims it to be." As the Ontario Court of Appeal explained in its recent decision in *R. v. C.B.*, 2019 CarswellOnt 7222 (C.A.):

[67] For electronic documents, s. 31.1 of the [*Canadian Evidence Act*] assigns a party who seeks to admit an electronic document as evidence the burden of proving its authenticity. To meet this burden, **the party must adduce evidence capable of supporting a finding that the electronic document is what it purports to be.** Section 31.8 provides an expansive definition of "electronic document", a term which encompasses devices by or in which data is recorded or stored. Under s. 31.1, as at common law, the threshold to be met is low. **When that threshold is satisfied, the electronic document is admissible, and thus available for use by the trier of fact.**

[68] **To satisfy this modest threshold for authentication, whether at common law or under s. 31.1 of the CEA, the proponent may adduce and rely upon direct and circumstantial evidence. Section 31.1 does not limit how or by what means the threshold may be met. Its only requirement is that the evidence be capable of supporting a finding that the electronic document "is that which it is purported to be."** That circumstantial evidence may be relied upon is well established: *Hirsch*, at para. 18; *R. v. Colosie*, 2016 ONSC 1708 (Ont. S.C.J.), at para. 25; *R. v. Bulldog*, 2015 ABCA 251,

326 C.C.C. (3d) 385 (Alta. C.A.), at para. 35; see also *R. v. Evans*, 1993 CanLII 86 (SCC), [1993] 3 S.C.R. 653 (S.C.C.), at p. 663. [. . .] [**emphasis** added; *emphasis* in original]

With respect to costs, Justice McGee ordered the mother to pay the father his full recovery costs of \$438,000 (rounded). She found that the mother had acted in bad faith as she had "actively deceived [the father], made false allegations, falsified documents and spoofed emails and social media." She also found that the mother had engaged in conduct that was "clearly designed to inflict maximum emotional and financial harm, to deceive service providers and ultimately to manipulate the evidence before the Court."

Unfortunately for the father, given that the mother is apparently still in India, made repeated references to bankruptcy in her cost submissions, and is very likely judgment proof, we suspect he will never be able to recover a material portion of the costs that the mother now owes him.

When Justice McGee's decision was initially released, it garnered attention in the press because of the mother's attempt to rely on doctored emails and other electronic evidence, and Justice McGee's warning to lawyers and the courts about the need to guard against fake evidence:

[254] Fake electronic evidence has the potential to open up a whole new battleground in high conflict family law litigation, and it poses specific challenges for Courts. Generally, email and social media protocols have no internal mechanism for authentication, and the low threshold in the *Evidence Act* that requires only some evidence: direct and/or circumstantial that the thing "is what it appears to be;" can make determinations highly contextual.

[255] In a digital landscape, spoofing is the new "catch-me-if-you-can" game of credibility.

[256] I urge lawyers, family service providers and institutions to be on guard, and to be part of a better way forward. Courts cannot do this work alone, and the work must be done well. High conflict litigation not only damages kids and diminishes parents; it weakens society as a whole, for generations to come.

There is another important lesson to be learned here. There is something seriously wrong with the system when a parent with a meritorious case is essentially forced to choose between giving up any chance of having a relationship with his or her child, or spending close to half a million dollars on a 20-day trial against an opposing party with little hope of being able to recover costs at the end of the case. It is also ridiculous that our already strained family court system had to devote four full weeks of court time (to say nothing of the amount of time it must have taken Justice McGee to wade through the voluminous evidence and write her decision) to deal with these types of high conflict cases and ungovernable litigants. Surely there has to be a better way.

Interim Distribution of Family Property - Considering the Considerations

Coglon v. Coglon, 2021 CarswellBC 673 (S.C.) - Master Elwood

Coglon offers a good review of claims for interim disbursements and the degree of "reasonable prospect of success" necessary to support such an order.

The wife requested an interim distribution of family property to fund her legal expenses, as well as interim child and spousal support. The husband, however, raised a threshold issue: he argued that the wife's claims for support and property division were statute-barred because the wife had filed her Notice of Family Claim after the expiry of the two-year limitation period in the *Family Law Act*, S.B.C. 2011, c.25 (the "*FLA*").

The parties met in 2003. The previously-divorced husband was already a successful venture capitalist with significant assets. The wife was a pre-school teacher with no assets, a student loan and other debt.

The parties began a marriage-like relationship in or about October 2004. They had a child in 2006, and the wife left her job to care for the child and manage the household. The family enjoyed a very luxurious lifestyle.

Almost all of the \$22 million in assets acquired by the parties during their relationship were in the husband's name.

The husband was of the view that they separated in October 2015. The wife disagreed - she said they stayed together until at least June 22, 2018, and finally separated on December 1, 2018.

The wife filed a Notice of Civil Claim on August 12, 2019; if the parties separated prior to August 13, 2017, she was out of time to claim a share of the family property or spousal support.

The wife requested an interim distribution in the amount of \$150,000, and interim child and spousal support based on the husband's annual income of approximately \$590,000 per year.

An interim distribution of family property under s. 89 of the *FLA* may be justified when it is necessary to permit the parties to advance their respective cases on a relatively level playing field: *L. (M.A.) v. L. (N.A.)*, 2014 CarswellBC 315 (S.C.). The concept of awarding "something" by way of an interim payment - be it called interim costs, interim disbursements, or an interim distribution of property - to "level the playing field" is quite consistent across Canada. Generally, the tests involve some considerations of:

- The costs/disbursements/payments being reasonable and necessary given what appears to be a meritorious claim;
- Some notion of "levelling the playing field"; and
- The claimant showing that they cannot fund the amounts on their own or with other resources.

Furthermore, these types of interim awards are generally no longer considered to be "exceptional."

However, as noted below, it is important to first consider whether it is *appropriate* in any given case that the playing field be levelled. Sometimes by "levelling the playing field", the risk profile of the litigation is significantly altered such that one side is able to litigate with less risk. More on that below.

Section 89 of the *FLA* provides that:

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

Generally, an applicant must show that (a) an advance is necessary to challenge the other's position at trial, and (b) the advance will not jeopardize the other party's claim: *McKenny v. McKenny*, 2015 CarswellBC 2173 (S.C.) at para. 57.

As noted by Justice Ballance in *F. (I.) v. R. (R.J.)*, 2015 CarswellBC 1266 (S.C.), the purpose of s. 89 is to promote access to justice:

[192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the *FLA*.

To counterbalance the idea of "levelling the playing field" or providing for "access to justice" is the notion of such an interim distribution being "harmful to the interests of a spouse". Again, looking to Justice Ballance in *F. (I.) v. R. (R.J.)*:

[193] . . . Determination of the presence of harm requires the court to reasonably anticipate and then assess the consequences that may flow from the interim order being sought. That approach, in turn, invites a highly individualized component to the inquiry. For example, would the distribution being sought in the particular case require a sale of property or of the encumbering of assets; what income tax ramifications might be triggered and what other transactional costs would arise? The concept of harm under s. 89 would also encompass economic implications such as whether the distribution would adversely impact the other spouse's lifestyle or effectively undermine or prejudice his or her argument for reapportionment.

Such harm to a responding spouse might be, for example, the forced-funding of an unmeritorious claim. This is likely what Justice Mesbur was referring to in *Ludmer v. Ludmer* (2012), 25 R.F.L. (7th) 397 (Ont. S.C.J.), when she suggested that it is not always necessary to level the playing field and sometimes improper to shift the risk of failure to the funding party (so as to change the risk profile of the case). To allow someone to litigate without regard to the need for proportionality and without regard to the likelihood of success is at best unfair, and at worst dangerous - especially if there would be no way for the recipient to repay the amount if the underlying claim is not ultimately successful.

Therefore, most courts require the applicant to show some reasonable prospect of success before an award of an interim distribution will be allowed. They need not show that the claim "will be" successful, or even that it is likely to be successful, but they do need to show a reasonable prospect of success. See, for example: *Balsmeier v. Balsmeier* (2014), 50 R.F.L. (7th) 390 (Ont. S.C.J.); *Dillon v. Dillon*, 2013 CarswellOnt 17537 (S.C.J.).

In *Coglon*, the husband's obligation to pay child support was not in dispute. However, Master Elwood required the wife to show there was a reasonable prospect of success on the limitation issue before ordering an interim distribution of family property. This is no different than having to show a reasonable prospect of success on setting aside a marriage contract in *Balsmeier*.

Master Elwood also noted that he had to consider whether the wife would be able to repay the interim advance should her claim be dismissed. An interim distribution will only result in the kind of harm contemplated by s. 89 if an applicant could not repay the advance over a reasonable period of time. For this reason, courts sometimes decide to provide for an advance - but structure it as a loan (sometimes secured and sometimes with interest payable): *Stuart v. Stuart* (2001), 24 R.F.L. (5th) 188 (Ont. S.C.J.); *Ejsymont v. Ejsymont*, 2010 CarswellOnt 4558 (S.C.J.); *Ejsymont v. Ejsymont*, 2010 CarswellOnt 4558 (S.C.J.); *McIlvenna v. Pinkowski*, 2010 CarswellOnt 7019 (S.C.J.); *Sharma v. Sunak*, 2011 CarswellOnt 14986 (S.C.J.).

Master Elwood properly set out the factors he had to consider: (i) Is there a reasonable prospect the wife will succeed on the limitation issue? (ii) Is an advance of \$150,000 necessary for the wife to advance her claim at trial? (iii) Would an advance of \$150,000 be harmful to the interests of the husband?

In B.C., an award of an interim distribution of family property is called an "extraordinary remedy": *McKenny v. McKenny* at para. 57. An award of interim property (or interim equalization) is also relatively rare in other provinces, but this may be because, in Ontario for example, the *Family Law Rules* specifically provide for an award of interim or advance costs.

In considering the reasonable prospect of success, Master Elwood noted that the wife had to defeat the husband's argument that the parties separated in October 2015. Master Elwood reviewed the factual circumstances surrounding the slow end to the relationship (s. 3(4) of the *FLA* provides guidance on when parties have separated), and two leading cases on determining the date of separation (*Bartch v. Bartch*, 2019 CarswellBC 2861 (S.C.) and *Coupar v. Roh*, 2014 CarswellBC 2178 (S.C.)).

He then noted that the parties had started to spend significant amounts of time apart in late 2014, and that they had had a "pivotal discussion" on October 23, 2015. The husband's evidence of that discussion was that the wife asked for a separation and he agreed the relationship was over, but they also agreed to continue living in the same home and vacationing together for the sake of their child. The wife's evidence was that they discussed separating, but did not decide to separate at that time.

While there was a good amount of evidence to support the husband's claimed date of separation, ultimately, Master Elwood determined that the date of separation would come down to the credibility of the parties and independent evidence. He found he could not just reject the wife's evidence concerning the nature of the relationship after October 2015. Therefore, Master Elwood was satisfied there was a reasonable prospect the wife would be able to defeat the limitations argument. Based on the evidence recounted by the Master, we suspect the wife may have just made it in under the wire here, as there was certainly a good amount of written evidence against her position, including emails. That said, she did not have to prove her case on a balance of probabilities on the motion. She only had to show that it had a reasonable chance of success.

So - was an advance of \$150,000 "necessary" to allow the wife to advance her claims at trial?

To show "necessity", a litigant should provide evidence as to why their litigation budget is not attainable from other resources: *J. (L.L.) v. J. (E.)* (2013), 39 R.F.L. (7th) 119 (B.C. S.C.); *Longeau v. Wolfe*, 2016 CarswellBC 1279 (S.C.); *Chung v. Harrison* (2018), 15 R.F.L. (8th) 359 (B.C. S.C.). A claimant should also show that there are no other resources available to carry the case: *Blackstock v. Comeau* (2018), 4 R.F.L. (8th) 317 (Ont. S.C.J.); *Ludmer v. Ludmer* (2012), 25 R.F.L. (7th) 397 (Ont. S.C.J.); *Pakka v. Nygard*, 2002 CarswellOnt 3403 (S.C.J.); *Root v. Root*, 2008 CarswellOnt 3995 (S.C.J.); *Gold v. Gold* (2009), 80 R.F.L. (6th) 171 (Ont. S.C.J.); *Blatherwick v. Blatherwick*, 2012 CarswellOnt 5695 (S.C.J.); *Richardson v. Lord*, 2012 CarswellOnt 14599 (C.J.); *M. (C.M.) v. C. (D.G.)* (2014), 46 R.F.L. (7th) 48 (Ont. Div. Ct.); *Beasley v. Beasley*, 2019 CarswellOnt 3336 (S.C.J.).

The husband had already advanced \$75,000 or \$100,000 to the wife for her litigation needs. Those funds had been used by the wife to pay legal fees related to the pleadings, initial document disclosure, preparation of a financial statement, attendance at a Judicial Case Conference, and an unsuccessful mediation. The wife's counsel estimated that a further \$150,000 would be required, "to complete document disclosure, instruct the income expert, review her report, conduct examinations for discovery and attend to other pre-trial matters, including possible interim court applications." This was found to be a rather vague estimate and not a meaningful litigation budget. That said, the Master accepted that a further advance was needed to level the playing field and to allow the wife to advance her case given the clear litigation expenses to come.

Finally, Master Elwood had to consider whether an advance would harm the husband's interests. Given the husband's net worth, this was a difficult position for the husband to take; but he tried. He argued that he funded the investments he used to earn his income (on which he paid support) with the line of credit secured against the home. He said he needed unfettered access to the line of credit to take advantage of investment opportunities. This was perhaps not the best argument given the wife was looking for \$150,000, and the line of credit was for \$5 million (even if there was only \$3.35 million of room available at the time). It was certainly hard for the husband to suggest that advancing the wife \$150,000 would, in any way, impair his borrowing ability or his ability eke out a living.

However, the wife's ability to repay the advance if she was unsuccessful in the litigation did give the Master pause. The wife was not working. She had no current income. And she showed only \$8,000 in assets on her Financial Statement.

However, the wife was only 52 years old, and according to the Master, there was no reason she could not return to work in the future, and repay the husband "over time" if necessary. Respectfully, suggesting that someone facing a serious limitation period issue, having no income, and only \$8,000 in disclosed assets might repay \$150,000 "over time" renders the consideration of "ability to repay" rather meaningless.

Clearly (and reasonably) the Master wanted to make sure the wife had the chance to advance her claims; but he should not have voided this consideration of all meaning in doing so.

That said, the "ability to repay" criteria, while a proper consideration, does appear to be the least weighty consideration: *Rosenberg v. Rosenberg* (2003), 39 R.F.L. (5th) 403 (Ont. S.C.J.); *McIlvenna v. Pinkowski*, 2010 CarswellOnt 7019 (S.C.J.). And some cases even suggest it is illogical to consider ability to repay because if that ability existed, there would be no need for the interim payment: *Romanelli v. Romanelli*, 2017 CarswellOnt 2724 (S.C.J.). Some cases simply "call it like they see it" and plainly say that an applicant does not need to prove the ability to repay: *Benzeroual v. Issa and Farag* (2017), 95 R.F.L. (7th) 149 (Ont. S.C.J.); *Romanelli v. Romanelli*, 2017 CarswellOnt 2724 (S.C.J.).

Here it probably would have been better for the Master to acknowledge the fact that, were the wife to be unsuccessful, the husband would have a hard time getting repaid, but on the facts of this case, the questions of "necessity" and "levelling the playing field" swamped the "lesser" consideration of repayment. The wife had \$8,000. The husband had \$22 million. The wife earned no income. The husband earned \$500,000 a year. Do the math. The result was inevitable. The wife was going to have a chance to advance her case.

The Master found an interim distribution of \$150,000 to be justified. However, if the wife wanted another advance in the future, she had to provide an accounting of the \$150,000, a proper litigation budget to the conclusion of a trial, **and** a proposal for repayment. Clever.

Perhaps to somewhat compensate the husband, the Master did give him a break on interim support. The limitation period issue aside, the wife had an excellent claim for spousal support on both compensatory and non-compensatory grounds. It was a very traditional marriage and the wife had by then been out of the workforce for 14 years.

The wife did not have much. The husband earned anywhere from \$500,000 to \$600,000 a year. Mid-range SSAGs on his income would have been in the range of \$24,466 per month. However, the Master awarded child support of \$4,263 and spousal support of \$12,425 based on an income to the husband of \$523,380 a year.

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