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

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Do You Hear What I Say?

R.M. v. J.D. (2020), 36 R.F.L. (8th) 355 (N.B. Q.B.) - d'Entremont J.

R.M. provides a good example of how courts assess whether to admit a child's out-of-court (i.e. hearsay) statements into evidence for the truth of their contents.

The parties had a son together. Although the reasons do not disclose his exact age, it appears he was around 10 or 11 years old by the time of the trial. The father was requesting sole custody with supervised access to the mother, while the mother wanted a shared parenting arrangement.

During the trial, the father wanted to introduce out-of-court statements that the child had made to both him and the child's aunt that raised some very serious concerns about the mother. According to the father and the aunt, the child had told them that the mother was not feeding him, that strange men were constantly coming and going from her home (and he would have to stay in his bedroom while they were there), and that drugs were being used in the mother's apartment.

While this evidence was certainly relevant (and concerning), it was also clearly hearsay, and given the age of the declarant, the classic hearsay dangers were also especially concerning. These "hearsay dangers" can be overcome by showing (1) that there are adequate substitutes for testing truth and accuracy ("procedural reliability"); or (2) that there are sufficient circumstantial or evidentiary guarantees ("circumstantial guarantees of trustworthiness") that the statement is inherently trustworthy ("substantive reliability").

Accordingly, Justice d'Entremont had to consider whether the statements were admissible. As we discussed in the July 20, 2020 edition of *TWFL*, the principled approach (as opposed to the classic hearsay exception) allows hearsay to be admitted into evidence if the trier of fact is satisfied that the out-of-court statements are both necessary and reliable. Here, given the child's age, and the nature of his evidence, Justice d'Entremont had no difficulty finding necessity - it would be too traumatic for him to have to testify in court. Accordingly, she was satisfied that the evidence was necessary.

Justice d'Entremont then examined the circumstances under which the out-of-court statements were allegedly made to determine threshold reliability - whether the circumstances mitigated the traditional "hearsay dangers" (perception, memory, narration or sincerity: *R. v. Bradshaw*, 2017 CarswellBC 1743 (S.C.C.)) and the inability to test the statements with cross-examination. As the Supreme Court of Canada explained in *R. v. Khelawon*, 2006 CarswellOnt 7825 (S.C.C.), there are generally two ways to establish that hearsay is reliable:

[62] **One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about.** Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:

There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [§1420, p. 154]

[63] **Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested.** Recall that the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination. This preferred method is not just a vestige of past traditions. It remains a tried and true method, particularly when credibility issues must be resolved. It is one thing for a person to make a damaging statement about another in a context where it may not really matter. It is quite another for that person to repeat the statement in the course of formal proceedings where he or she must commit to its truth and accuracy, be observed and heard, and be called upon to explain or defend it. The latter situation, in addition to providing an accurate record of what was actually said by the witness, gives us a much higher degree of comfort in the statement's trustworthiness. However, **in some cases it is not possible to put the evidence to the optimal test, but the circumstances are such that the trier of fact will nonetheless be able to sufficiently test its truth and accuracy. Again, common sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence.** [emphasis added]

There are many, many family law cases where a child's out-of-court statements will not be reliable because, for example, the child has been coached, pressured, or alienated; is a poor narrator; has bad recall; cannot tell fact from fiction, etc. But in this case, after considering the circumstances under which the child's statements were made, Justice d'Entremont was satisfied that they were reliable:

[8] I also concluded that the child's statements were reliable. In doing so, I looked at a number of factors as outlined above. **In the within matter, [the child] disclosed what was happening at his mother's apartment to his father . . . and to his aunt M. a few days apart. His statements were not provoked, rather they were spontaneous. The two adults did not ask leading questions, rather they listened, and they let him talk. The timing of the statements was early in the morning of March 29, 2018, on his way to school while walking to school with his father, and at his aunt's house on April 1, 2018, Easter Sunday. The child was serious when he gave his account of the events taking place at this mother's home.** He talked about a lot of men coming to the residence; they would ask for money. He had to be quiet and he had to stay in his bedroom while his mother and the visitors were in her bedroom. By then, he was in grade 4; he was about 9-1/2 years old. **[The child] had no reason to fabricate the statements, that is to speak negatively about his mother, as he still cared for her.** He also admitted to being scared and to having a safety plan for escaping the apartment. [emphasis added]

To this we would add that it might also have been appropriate to admit the child's statements into evidence on the basis that there were a number of ways for the mother to challenge and test them without having to cross-examine on the statements. For example, it was open to the mother to lead other evidence to contradict and/or disprove the child's evidence about what had been happening while he was in her care, or to show that the child had a motive to fabricate or was a bad narrator.

It is important to remember that the mere fact that a child's out-of-court statements are *admitted* into evidence does not mean that the trial judge is required to give them any weight - they are just another piece of evidence, and it is up to the trier-of-fact to decide how much, if any, weight to give to them. Having the statements admitted speaks only to *threshold* reliability, not ultimate reliability.

In this case, however, Justice d'Entremont gave the child's evidence significant weight, and relied on it (along with other direct evidence that corroborated the concerns that the child had raised), to conclude that it would be in the child's best interests for the father to have sole custody, and for the mother to have supervised access.

Is Non-Disclosure the Cancer of Family Law . . . Or Not?

Florovski v. Florovski, 2019 CarswellOnt 14087 (S.C.J.) - Vallee J.

Florovski v. Florovski, 2020 ONSC 7486 - Bennett J.

In 2019, the wife brought a motion to strike the husband's pleadings for failing to produce disclosure, or in the alternative, for an order requiring the husband to produce the disclosure with a penalty for each day that he failed to comply with the order.

By the time of the motion before Justice Vallee, four years had passed since the wife had issued her Application, and five court Orders had been made regarding disclosure.

Although Justice Vallee was convinced that a considerable number of disclosure requests remained outstanding, as the husband had made *some* disclosure in recent months, her Honour gave the husband one last chance to provide the outstanding disclosure - but on strict terms.

Justice Vallee set out the seven categories of disclosure the husband was to provide within seven days - the usual stuff of disclosure: bank statements, pension information, an accounting of some "missing funds", etc.

Relying on cases such as *Granofsky v. Lambersky* (2019), 26 R.F.L. (8th) 328 (Ont. S.C.J.) and *Mantella v. Mantella* (2008), 61 R.F.L. (6th) 252 (Ont. S.C.J.), the wife asked the Court to order the husband to pay a daily fine until disclosure was complete. In *Granofsky*, Justice Diamond stated as follows:

[28] In my view, **the Court has jurisdiction under the *Family Law Rules* to order a fine or monetary payment as part of its role to control and enforce its own process. Such a remedy places a price on non-compliance with court orders and disclosure obligations commensurate with that process.** While a remedy of a fine or monetary payment **should be reserved to exceptional and/or egregious circumstances**, the respondent has been given opportunity after opportunity to comply with his duty to disclose financial information and documentation and I find the case before me to be a fitting example.

.....

[30] The applicant requests an order compelling the respondent to comply with his outstanding obligations by a specified date, failing which he should pay the applicant a penalty of \$500.00 per day for each day of non-compliance. In my view, such a proposal is reasonable. As previously stated, **costs orders have been made against the respondent, and while he has complied with those costs orders, their impact has not resulted in compliance with his duty to disclose financial information/documentation.** [emphasis added]

Furthermore, if the only penalty for not complying with an Order was a successive string of Orders for costs, they would eventually just become a cost of doing business and of frustrating the opposing party. That seems odd for a system where "[t]he most basic obligation in family law is the duty to disclose financial information. This requirement is immediate and ongoing." [*Roberts v. Roberts* (2015), 65 R.F.L. (7th) 6 (Ont. C.A.)]

The wife asserted that, just as with *Granofsky*, there was no point in just "another court order." Five previous orders had been made and, for the most part, ignored; and the husband simply paid the associated costs Orders.

Justice Vallee noted that the husband had the means to litigate. His investments had increased by almost \$1.2 million from March 2017 to March 2018. He was investment-savvy, and earned \$722,154 in 2018. At a previous Case Conference, the Court

said, "Here we are, three years after separation, and we do not have sufficient information upon which to hold a discussion on equalization or finalize spousal and child support. It is a waste of time. It is expensive. It demonstrates bad faith. The [husband] states that the litigation is quite complex and quite involved. It is not."

In his defence, the husband stated that he did not have the records in issue and that the wife had kept some of the records when the parties separated. He also suggested - without any supporting evidence - that he suffered from psychiatric problems.

Justice Vallee was not interested in further excuses. There was no medical evidence of the husband's alleged psychiatric problems. Most of the outstanding disclosure was easy to obtain or show that it could not be obtained.

Finding the circumstances to be "exceptional and egregious" her Honour ordered the husband to provide the disclosure by September 2, 2019 (one week), failing which "he shall pay a daily fine to the wife of \$500 per day for each day of non-compliance commencing on September 3, 2019."

She also ordered that if the husband had not provided the disclosure by September 16, 2019, the wife could proceed with a motion to have the husband's pleadings struck on five days' notice.

Fast forward to December 2, 2020. The parties are in Court again. According to the wife, the husband had still not produced all of the court-ordered disclosure - and the husband owed her \$224,000 (\$500 a day can really add up). The wife brought a motion to strike the husband's pleadings and to compel him to pay her the \$224,000 he owed pursuant to Justice Vallee's Order.

The Court hearing this motion determined that almost all of the disclosure had been produced except for bank account statements for some months of 2020 for one particular Canadian/US account, and an accounting of \$25,000 that the husband allegedly withdrew prior to separation. And, counsel for the wife confirmed that only two of the 17 items Justice Vallee ordered be produced were still outstanding.

The judge also had some distant memory of the matter:

[4] Even though this court is now operating remotely and does not have access to the court file, the court recalls that it first became involved in this matter at the time of separation [2015] when the [husband] was confined to a psychiatric ward and the [wife] had brought an urgent motion.

[5] This court was subsequently involved with respect to other motions brought by the [wife] for disclosure.

[6] In one of those previous motions, this court commented on the aggressiveness of the [wife] with respect to that disclosure.

The husband argued that the *bulk* of the disclosure had been provided in June 2020, which was *before* the wife notified the husband that she would be in fact bringing this motion. However, some was only provided a few days before the motion, and after the husband had already been served.

The Court first noted, as is the case, that striking pleadings is reserved for the most egregious situations. However, Justice Vallee had previously specifically determined the situation to be egregious. That said, at least with respect to the punishment of having his pleadings struck, the husband had gone at least *some* way to rehabilitate himself.

Things then took a bit of an odd turn. The Court noted that both the disclosure and the manner in which production is sought must be proportional and reasonable. But the required disclosure and penalty upon failure to produce had been ordered by Justice Vallee - and her Order had neither been appealed, nor set aside, nor varied in any way.

The Court also suggested that the husband had a reasonable excuse for not providing an accounting of monies taken from the joint account - because he thought the withdrawals had been in 2015 when they were in 2014. We suspect that had the husband been diligent, this would not have been an issue. And, second, at the time of separation (five years ago) the husband had

been hospitalized for a number of months in the psychiatric ward. (However, as noted above, the husband was very successful financially.)

The Court then noted that the total amount in question was \$25,000; that the withdrawals predated the date of separation; and that the lack of disclosure could be addressed at trial if the trial judge determined the withdrawals to be relevant. But Justice Vallee had already ordered the disclosure to be produced.

The Court then offers this, with which we take issue, given Justice Vallee's previous Order:

[22] Based on the materials filed and the submissions made, this court does not find that the actions or inactions of the [husband] justify either an Order striking his pleadings or an Order requiring him to pay \$224,000 in penalties. In fact, this court finds that the request for such relief is consistent with this court's finding at a previous motion that the relief being sought by the [wife] was overly aggressive.

[23] Therefore motion dismissed. This is without prejudice to the [wife] arguing at trial that there should be some cost sanctions for the [husband] allegedly not having produced disclosure in a timely fashion subsequent to the Order of Justice Vallee.

[24] However, based on today's motion, any cost sanctions would be a minuscule percentage of the \$224,000 sought.

Justice Vallee made an Order. Again, that Order was not appealed, and the husband had not moved to set it aside, nor had he - at any time - moved to change it in any way. He simply let the penalty mount. The Order itself did not suggest that the husband could move to reduce the penalty. The Order was clear on its face: her Honour found the circumstances to be "exceptional and egregious" and she ordered that the husband provide the disclosure by September 2, 2019, failing which "he *shall pay a daily fine to the wife of \$500 per day for each day of non-compliance commencing on September 3, 2019.*" [emphasis added] It seems pretty clear to us. However, there is now confusion as to the status of Justice Vallee's Order. Has it been varied? Changed? Is it to be ignored? And, more important, does this Order now make enforcement of Justice Vallee's Order *res judicata*? It may just.

Respectfully, it was not open to the Court to suggest that Justice Vallee's Order was not "justified." And it sets a dangerous precedent. Recall that in *Granofsky*, Justice Diamond awarded a similar penalty because the costs orders that had been made against the respondent in that case did not result in compliance, hoping that "[a] daily, monetary penalty . . . will hopefully have a different impact." That is exactly what was done by Justice Vallee in similar circumstances. A fine is a serious penalty that should be awarded only in the most egregious circumstances, after much consideration, and as a last resort. But once it is ordered, that must be the end of it, absent specific wording in the Order so as to allow the non-discloser to claim relief on reasonable grounds.

Ironically, this current Order actually provides adverse incentives. It may very well encourage future "non-disclosers" to continue "non-disclosing", because while small fines might be enforced - really large fines are more likely to be questioned.

If non-disclosure is truly the "cancer" of family law (see *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.), citing Fraser J. in *Cunha v. Cunha*, 1994 CarswellBC 509 (B.C. S.C.)), once the cancer is excised, it cannot be allowed to grow back.

The Duty of Good Faith in Contract Performance: No More Lyin', Cheatin', or Deceivin'; Now Where's The Fun in That?

C.M. Callow Inc. v. Zollinger, 2020 CarswellOnt 18468 (S.C.C.)

Less than 2 percent of family law proceedings that are started actually end with a trial. Most end with Minutes of Settlement or a Separation Agreement. Therefore, in our continuing efforts to keep you abreast of all that may be important in the area of family law, we bring you the very latest from the Supreme Court of Canada about the duty of honesty in contractual performance.

In *C.M. Callow Inc.*, the Supreme Court of Canada further incrementally expanded the duty of honesty in contractual performance, and affirmed that the notion of "dishonesty" giving rise to a breach of contract goes beyond outright lies and includes half-truths and omissions - and sometimes even silence where there is otherwise a duty to speak.

Although *C.M. Callow Inc.* specifically dealt with dishonesty in the termination provisions of a contract, the principles that it discusses are unquestionably transferable to Domestic Contracts.

In 2012, Baycrest (a group of condominiums) entered into a two-year winter maintenance contract and a separate summer maintenance contract with Callow. These contracts were to expire in April 2014 and October 2013, respectively. Pursuant to a clause in the winter maintenance contract, however, Baycrest was entitled to terminate the contract earlier if Callow failed to give satisfactory service. The termination provision also provided that if Callow's services were no longer required for any *other* reason, Baycrest could terminate the contract on 10 days' written notice.

In early 2013, Baycrest decided to terminate the winter maintenance contract, but did not inform Callow as it was concerned that Callow would abandon the less profitable summer contract if the winter contract was cancelled. Instead, throughout the spring and summer of 2013, Baycrest participated with Callow in discussions regarding a renewal of the winter maintenance contract. Based on those discussions, Callow believed that it was likely that the winter maintenance contract would be renewed for two years, and that Baycrest was satisfied with its services. During the summer of 2013, Callow also performed work above and beyond the summer maintenance contract at no charge, which it hoped would further incentivize Baycrest to renew the winter maintenance contract.

In September 2013 (i.e. after Callow had nearly completed its obligations under the summer contract), Baycrest notified Callow that it had decided to terminate the winter maintenance contract. Callow claimed breach of contract, and alleged that Baycrest had acted in bad faith.

The trial judge held that the general organizing principle of good faith in contract law (*Bhasin v. Hrynew*, 2014 CarswellAlta 2046 (S.C.C.)) had created a new duty of honest contractual performance that required parties "not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract." She was satisfied that Baycrest had "actively deceived" Callow from the time the termination decision was made in early 2013 to September 2013, and found that Baycrest had acted in bad faith by (1) withholding that information so as to ensure Callow performed the summer maintenance contract; and (2) falsely representing that the winter maintenance contract was not in danger, despite (3) knowing that Callow was taking on extra tasks to bolster the chances of the winter maintenance contract being renewed.

The trial judge found that the "minimum standard of honesty" required Baycrest to address the alleged issues with Callow's performance, provide prompt notice of termination, or refrain from making any representations regarding contract renewal.

The trial judge then awarded expectation damages to Callow to place it in the position it would have been in had the breach not occurred.

The Ontario Court of Appeal set aside the trial decision, as it was of the view that the trial judge had improperly expanded the duty of honest performance beyond the terms of the winter maintenance contract. It also held that any "deception" during the summer of 2013 related to a new contract not yet in existence - the renewal that Callow hoped to negotiate - and was therefore not directly linked to the performance of the winter maintenance contract.

The Supreme Court of Canada reversed the Ontario Court of Appeal. Justice Kasirer wrote the majority's decision, and Justice Brown wrote a concurring decision that was joined by two other judges. Justice Côté was alone in dissent.

The majority ruled that the duty of honest performance precluded active deception (that is, outright lying), and that Baycrest had breached this duty by knowingly misleading Callow into believing that the winter maintenance contract would not be terminated. Furthermore, this was a matter that was directly linked to the performance of the contract, because Baycrest had exercised a contractual obligation (i.e. the termination clause) dishonestly, even if it had satisfied the actual 10-day notice obligation.

For the majority, Justice Kasirer wrote as follows:

[5] I respectfully disagree with the Court of Appeal on whether the manner in which the termination clause was exercised ran afoul of the minimum standard of honesty. **The duty to act honestly in the performance of the contract precludes**

active deception. Baycrest breached its duty by knowingly misleading Callow into believing the winter maintenance agreement would not be terminated. **By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied and irrespective of their motive for termination.** For the reasons that follow, I would allow the appeal and restore the judgment of the Ontario Superior Court of Justice.

.....

[53] Good faith is thus not relied upon here to provide, by implication, a new contractual term or a guide to interpretation of language that was somehow an unclear statement of parties' intent. Instead, **the duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right** because the duty, irrespective of the intention of the parties, applies to the performance of all contracts and, by extension, to all contractual obligations and rights. This means, simply, that **instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest.** [emphasis added]

The majority and the concurring opinion then went further. They found that the standard of honesty required under the organizing principle of good faith extended beyond outright lies, and also included "half-truths, omissions, and even silence, depending on the circumstances." Failing to correct a misapprehension caused by one's *own* misleading conduct can result in a breach of the duty of honest performance where the counterparty was misled about matters directly linked to the performance of the contract.

In this case, the majority agreed with the trial judge that Baycrest deceived Callow through a series of "active communications": (i) communicating to Callow that renewal of the winter maintenance contract was likely and that all was fine with its performance, and (ii) accepting the "freebie" services offered by Callow, which suggested, at the very least, that there was hope for renewal and that the current contract would not be terminated.

However, the majority also agreed with the Ontario Court of Appeal that the trial judge went too far in concluding that the minimum standard of honesty would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period. These requirements would have substantively altered the bargain struck between the parties.

The Court also affirmed that *there is no free-standing positive duty to disclose information to a contractual counterparty*. Therefore, the Court has re-stated its position from *Bhasin* that there is no positive duty to disclose. As long as a party does not act dishonestly, parties are still allowed to negotiate and act in their own self-interests.

That very fine line-in-the-sand between a party acting in their own self-interest but only to the point of not misleading - even by way of silence - is going to be very hard to define in most cases. Furthermore, this new duty arguably allows one contracting party to force information and disclosure from the other so as to avoid a breach. We will have to see how this duty plays out over time.

In dissent, Justice Côté stated that "[Baycrest's conduct] may not be laudable, but it does not fall within the category of 'active dishonesty' prohibited by the contractual duty of honest performance." Further, "there were no outright lies . . . Regardless of how its conduct is characterized, Baycrest had no obligation to correct Callow's mistaken belief." We have to say, the dissent is compelling and avoids the "line-in-the-sand" issue noted above.

The main divergence between the majority and concurring opinions was about how to quantify damages for a breach of the duty of honest performance. The majority held that Callow was entitled to expectation damages - to be put in the position it would have been in had the contract been performed. This is the ordinary measure of damages for breach of contract. The majority was satisfied that if Baycrest's dishonesty had not effectively deprived Callow of the chance to bid on other contracts, Callow would have made an amount that was at least equal to the profit that it lost under the winter maintenance contract with Baycrest. Therefore, the measure of damages was the value of Callow's contract with Baycrest.

The concurring judges disagreed. They held that where a party breaches the duty of honest performance, the issue is not that the defendant failed to perform the contract thereby defeating the plaintiff's expectations. Rather, the defendant performed but caused damages to the plaintiff by making misrepresentations that the plaintiff relied on (contractual reliance damages).

How does this new obligation of honesty in contract performance impact family law? As but one example, consider how many Separation Agreements include a provision that a recipient spouse will make "best efforts" to become self-sufficient. While it has been held by the Supreme Court of Canada that s.15.2(6)(d) the *Divorce Act* does not impose a "duty" on a spouse to become self-sufficient, it has been accepted by at least one provincial appellate court that including such an obligation in a Separation Agreement can transform that statutory "non duty" into a contractual obligation: *Strecko v. Strecko* (2014), 44 R.F.L. (7th) 1 (N.S. C.A.). And what if a recipient does not actually make "best efforts" to become self-sufficient or to be employed as contractually required? What are the damages? The measure of damages would be to put the payor in the place s/he would have been had the recipient met his/her obligation to use best efforts to become self-sufficient - lower spousal support (or a termination of spousal support). At the very least *Callow* suggests this should feed directly into an imputation argument and possibly a more direct route to a spousal support variation.

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