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

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Nothing Much Here . . . Just a Fundamental Doctrinal Shift in the Way Releases Are To Be Interpreted

Corner Brook (City) v. Bailey, 2021 CarswellNfld 258 (S.C.C.)

Pretty much every Domestic Contract and Spousal Agreement contains releases. Therefore, this recent case from the Supreme Court of Canada — that fundamentally changes how releases are to be interpreted — is of interest to family lawyers. The Supreme Court also commented on principles of contract interpretation generally, and signaled possible changes to come, especially with respect to the use of evidence of negotiations in the interpretation of contracts. Again, this is not a family law case, but it's important.

The case resulted from a car accident. While Mrs. Bailey was driving her husband's car, she hit an employee of the City of Corner Brook (the "City"). The employee sued Mrs. Bailey. Separately, Mrs. Bailey and her husband started a claim against the City for damage to the car and her injuries. Mrs. Bailey and her husband settled with the City, and in doing so they released the City from liability relating to the accident. The release was with respect to ". . . all demands and claims of any kind or nature whatsoever arising out of or relating to the accident . . . and without limiting the generality of the foregoing from all claims raised or which could have been raised in the [action] . . ."

Years later, Mrs. Bailey brought a third-party claim against the City for contribution and indemnity in the action brought against her by the employee. The City brought a motion for summary judgment on the basis that the release barred the third-party claim.

Mrs. Bailey argued that the release did not bar the third-party claim because that claim was not specifically contemplated by the parties when they signed the release.

The Court at first instance granted summary judgment, agreeing that the release barred Mrs. Bailey's third party claim against the City. The Newfoundland and Labrador Court of Appeal unanimously allowed the appeal. And off to Ottawa everyone went (virtually, that is).

A unanimous full bench of the Supreme Court of Canada allowed the appeal. In dismissing Mrs. Bailey's third-party claim, the Court fundamentally altered the rules regarding the interpretation of releases which, for 150 years, had been interpreted narrowly.

For the Supreme Court, Justice Rowe noted that courts may be inclined to narrowly interpret even broadly-worded releases. However, going forward, the "ultimate question" is whether the claim at issue is the type of claim to which the release was directed, depending on the wording and surrounding circumstances of the release in each case.

Justice Rowe wrote as follows (sorry for the long quote — but we can't possibly say this more clearly):

[3] **There is no special interpretive principle that applies to releases.** The decisions below refer to the rule from the House of Lords decision in *London and South Western Railway Co. v. Blackmore* (1870), L.R. 4 H.L. 610, in which Lord Westbury stated, at p. 623: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given." As I will explain, **this "Blackmore Rule" has been overtaken by the general principles of contract law in [*Creston Moly Corp. v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (S.C.C.)]. The Blackmore Rule has outlived its usefulness and should no longer be referred to. Any judicial tendency to interpret releases narrowly is not a function of any special rule, but rather a function of releases themselves.**

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[17] ***Sattva* marked a significant change in the jurisprudence.** Traditionally, the interpretation of contracts was a matter of law, not mixed fact and law. This was because interpretation was seen primarily as an exercise in giving meaning to words. Circumstances were generally relevant to interpretation only where there was an ambiguity.

[18] **The Blackmore Rule was formulated in the traditional period to which I have just referred. In that view, courts were reluctant to have regard to the facts surrounding the formation of a contract, as an aid to its interpretation. The words of a contract were given their "black letter" meaning. This was problematic from the view of releases; the Blackmore Rule addressed this problem.**

[19] But 150 years after the *Blackmore* decision, things have changed. The facts surrounding the formation of a contract are relevant to its interpretation. The jurisprudential concerns that gave rise to the rule in *Blackmore* no longer exist. **It is no longer needed. It has outlived its usefulness and should no longer be referred to.**

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[20] This Court set out the current approach to contractual interpretation in *Sattva*. *Sattva* directs courts to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": para. 47. This Court explained that "[t]he meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement", but that the surrounding circumstances "must never be allowed to overwhelm the words of that agreement": paras. 48 and 57. "While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement": para. 57. This Court also clarified that the relevant surrounding circumstances "consist only of objective evidence of the background facts at the time of the execution of the contract. . . . , that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": para. 58.

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[43] Distinctions can be drawn between claims based on facts known to both parties (as in this case) and claims based on facts that were not known to both parties (as in [*Biancaniello v. DMCT LLP*, 2017 CarswellOnt 6974 (C.A.)]). Such distinctions may be relevant when interpreting a release and assessing whether the claim at issue is the kind of claim the parties mutually intended to release. **The ultimate question is whether the claim is of the type of claim to which the release is directed. This will depend on the wording and surrounding circumstances of the release in each case.** Lord Bingham's cautionary principle from [*Bank of Credit & Commerce International SA (In Liquidation) v. Ali (No. 1)*, [2001] 1 All E.R. 961 (Eng. H.L.)] should be understood not as a rule of interpretation, but rather an observation as to the issues that releases will tend to give rise to given their subject matter. **Any judicial tendency to narrow the meaning given to broad wording is not the function of any special rule, but rather a function of the context in which releases are given. Thus, the ordinary rules for contract interpretation set out in *Sattva* apply to releases as they do to other contracts.**

[44] In *Sattva*, this Court also explained that contractual interpretation is a fact specific exercise, and should be treated as a mixed question of fact and law for the purpose of appellate review, unless there is an "extricable question of law" . . .

[56] I make one final observation. The application judge also considered the pre-contract negotiations in reaching his conclusion that the parties mutually intended to release Mrs. Bailey's claim: paras. 30-38. The Court of Appeal did too, but reached a different conclusion: paras. 67-68. Neither party argued that there was anything wrong with this approach by the courts below. **However, there is a longstanding, traditional rule that evidence of negotiations is inadmissible when interpreting a contract:** see *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, at para. 100, per Côté and Brown JJ., in dissent; *Chartbrook Ltd. v. Persimmon Homes Ltd.*, [2009] UKHL 38, [2009] 1 A.C. 1101; *Hall*, at pp. 423-32; A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at pp. 745-48; K. Lewison, *The Interpretation of Contracts* (7th ed. 2020), at pp. 117-31; J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 809-13. **Justices Côté and Brown observed in *Resolute* that this rule "sits uneasily" next to the approach from *Sattva* that directs courts to consider the surrounding circumstances in interpreting a contract:** para. 100. **Hall and the authors of *Canadian Contract Law* both emphasize the difficulty in drawing a principled distinction between the circumstances surrounding contract formation and negotiations.**

[57] **I leave for another day the question of whether, and if so, in what circumstances, negotiations will be admissible in interpreting a contract.** That issue needs to await a case where it has been fully argued and is necessary in order to decide the appeal. In this case, the application judge did not consider the negotiations to be determinative in interpreting the contract one way or the other: see paras. 37-38 and 41.

[58] To conclude, there is no reviewable error in the application judge's conclusion that the release includes Mrs. Bailey's third party claim. The claim comes within the plain meaning of the words of the release, **the surrounding circumstances confirm that the parties had objective knowledge of all the facts underlying Mrs. Bailey's third party claim when they executed the release**, and like *Biancaniello*, the parties limited the scope of the release to claims arising out of a particular event. [emphasis added]

Therefore, henceforth releases are to be interpreted pursuant to the general principles of contractual interpretation. Releases, like any other contract, must be read "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."

Justice Rowe did note that the circumstances in which releases are signed often do lead courts to interpret them more narrowly. While parties usually draft and sign broad releases, the surrounding circumstances often suggest the parties objectively intended the release to only cover claims arising in relation to a particular situation. And then there is the fact that parties to a release are generally trying to deal with risks that are, at the time, unknown.

Therefore, the surrounding circumstances may, in some instances, cause courts to narrowly construe the words of a release simply because the broad wording of releases conflicts with the circumstances, particularly for claims not considered at the time the release was signed. However, Justice Rowe confirmed that, with sufficiently clear language, a release can absolutely apply to unknown claims. While the release need not list every possible claim, for a release to cover unknown claims it should so specify, and it should detail whether it applies to only claims related to a particular area or subject matter or more broadly, and whether there are any time limits.

Given that almost all Domestic Contracts and Spousal Agreements include some form of release — perhaps it is time we all have a look at our standard form releases so as to ensure we mean what we say and say what we mean.

The Opposite of "You're on Mute"

CAS v. J.J., C.M. and Six Nations of the Grand River, 52 R.F.L. (8th) 306 (Ont. S.C.J.) — Bale J.

We were recently involved in a case where a party was being questioned on Zoom and clearly did not appreciate that turning off their video during a break did not also mute their microphone. Hilarity ensued. And then there was the "I am not a cat" lawyer. Although the widespread use of Zoom as a replacement for in court attendances has resulted in some very funny moments, the consequences of these types of technological mistakes can also be very serious. Justice Bale's recent decision in *CAS v. J.J., C.M. and Six Nations of the Grand River* highlights the importance of ensuring that everyone is on mute when the court is on recess.

On the eighth day of a child protection trial, the Court took a brief recess while the mother was being cross-examined. The mother did not mute her microphone, and the other participants in the trial (including Justice Bale) heard the following statements from an unidentified male voice through the mother's microphone:

- "how much longer will you be" (or similar words to that effect).
- "hook some people up with some soft" (or similar words to that effect).

The mother then realized her microphone was still on, and pressed the mute button.

These off the record statements, and the clear presence of someone else in the room, raised serious concerns about whether an unknown third party was influencing the mother's testimony, and whether the statement "hook some people up with some soft" meant that the mother and/or the unidentified person she was with was involved in selling cocaine or other drugs.

The mother, supported by the Six Nations, brought a motion for a mistrial, and argued that a fair trial was no longer possible. She claimed that no one had been with her during her cross-examination, and the Court had heard a "voice clip" that was inadvertently sent to the mother and opened on her phone during the break. She also argued that the trial judge and/or court staff had become potential witnesses with respect to what had actually been said during the break.

The Children's Aid Society of Haldimand and Norfolk (the "Society") and the father opposed the mother's motion for a mistrial.

Justice Bale started by pointing out that she, as a judge of the Superior Court, was not a compellable witness [*MacKeigan v. Hickman*, 1989 CarswellNS 391 (S.C.C.), *R. v. Valente (No. 2)*, 1985 CarswellOnt 129 (S.C.C.), *R. v. Beauregard*, 1986 CarswellNat 1004 (S.C.C.), and *Condessa Z Holdings Ltd. v. Brown's Plymouth Chrysler Ltd.*, 1993 CarswellSask 332 (C.A.)]. Furthermore, while court staff may technically be compellable witnesses, the practice of calling court staff to give evidence should generally be avoided. As the Court noted in *R. v. Toutissani*, 2007 CarswellOnt 9737 (S.C.J.), aff'd 2007 CarswellOnt 7289 (C.A.), "[i]t should be the rare case where a court official such as a court reporter is compelled to participate in the trial itself[.]"

Justice Bale then provided a helpful summary of the principles that apply when considering a request for a mistrial and recusal for reasonable apprehension of bias:

[Mistrials]

[21] . . .

- Mistrial orders are in the discretion of the trial judge;**
- A mistrial may be declared where a judge that is seized of a matter is satisfied that, for any reason, there is a reasonable apprehension that either party will not have a fair trial if the current trial continues (and that a fair trial would be possible if it were to begin afresh before another judge);**
- Mistrials should be ordered only in the clearest of cases, where there has been a 'fatal wounding' of the trial process;**

d. **Mistrials should be granted only as a last resort**, where no other curative measure could salvage a just and fair trial; and

e. **Parties are entitled to fair trials, not perfect trials**: *R. v. Khan*, 2001 SCC 86, *Forsythe v. Tone*, 2018 ONSC 3598 CanLII, *Van Ooyen v. Carruthers*, 2018 SKQB 73, *R. v. Toutissani*, 2007 ONCA 772 CanLII.

.....

[Recusal for reasonable apprehension of bias]

[24] . . .

a. Bias or prejudice refers to a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. **Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case**: *R. v. Bertram* [1989] O.J. No. 2123 (QL) (H.C.), quoted by Cory J. in *R. v. S. (R.D.)* 1997 CanLII 324 (SCC) [1997] 3 S.C.R. 484 (S.C.C.), at para. 106);

b. The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that **test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly"**: *Committee for Justice and Liberty v. National Energy Board* 1976 CanLII 2 (SCC) at p. 394;

c. Impartiality is the fundamental qualification of a judge and the core attribute of the judiciary. It is key to the judicial process and must be presumed. While the requirement for judicial impartiality is a stringent one, **the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified**: *Wewyakum Indian Band v. Canada*, 2003 SCC 45 (CanLII), at para. 59;

d. **The threshold for a finding of real or perceived bias is high**: *R. v. S. (R.D.)* 1997 CanLII 324 (SCC) at para. 113. [emphasis added]

For further discussion about the general principles that apply when the court is considering a request for a mistrial in a family law case, see Philip Epstein's discussion of *Forsythe v. Tone*, 2018 CarswellOnt 9340 (S.C.J.) in the 2018-26 edition of *TWFL* (July 2, 2018).

After considering these principles, Justice Bale dismissed the mother's motion for a mistrial. Even if it was open to the court to consider the statements that it had heard during the break, and it was not, the statements would not have a determinative impact on the outcome of the trial given that:

- The mother was not seeking to have the child placed with her, and accepted that her time with the child should be supervised.
- Justice Bale was satisfied that the mother's explanation that she had inadvertently played a recording of a voice clip over the break was "plausible", and did not place the mother's credibility in issue. She was also satisfied that the mother's evidence had not been tainted by outside influence.
- The allegations against the mother related solely to alcohol abuse, and not drug abuse or drug dealing.

- The Society had already investigated the events that had taken place during the recess, and the investigation had not resulted in any changes to the child's current placement (with the maternal grandmother).

Justice Bale was also satisfied that she could disabuse herself of the inadmissible statements that had been made during the break:

[31] **It is a function of a trial judge to be able to be unaffected by inadmissible evidence. Trial judges are routinely entrusted with the task of hearing and rejecting information that should not be entered into the court record.** If this were not the case *voir dire*s as to the admissibility of evidence in all proceedings would routinely be heard by someone else. Likewise, family court judges presiding over temporary care hearings would be precluded from hearing any subsequent child protection trial in the same proceeding as a result of their previous consideration of a lower threshold level of 'credible and trustworthy' evidence: see for example *Children's Aid Society of Ottawa v. A.*, 2015 ONSC 38 at para. 6. **Trial judges can and routinely do disabuse their minds of potentially prejudicial information. The circumstances before me, although unique in fact, are not different in principle.**

[32] This court will disabuse itself of the discussions overheard in the virtual courtroom during the court recess. **A reasonable, thoughtful, and informed person, viewing the matter realistically and practically, would presume that a judge of this court who has sworn the judicial oath of office could and would faithfully perform this requisite judicial function.** [emphasis added]

While the idea that a judge can simply "ignore" evidence or facts that should be ignored seems an impossibility to many, speaking from experience, it is actually not difficult for a judge or arbitrator to do exactly that.

The father and the Society also tried to argue that the mother should not be permitted to cause a mistrial through her own carelessness. In rejecting this argument, Justice Bale noted that what had happened was simply an unfortunate and inadvertent mistake, and that "[a]tributing fault does not assist in the legal analysis in this matter or impact this court's decision."

Finally, given that this was a child protection case that had already been outstanding for more than two years, and that the trial was close to being finished, Justice Bale was satisfied that "[t]he collective interests of the parties, the child, and public at large all weigh in favour of continuing with this trial", and ordered the trial to continue without calling further evidence about the statements in question.

This is not going to be the last time that this type of situation occurs. But the risk can be curtailed significantly by ensuring that the registrar reminds everyone to ensure that they are on mute when the court takes a break, and/or simply having the registrar mute everyone during breaks in a proceeding. It also behooves counsel to make sure clients know to mute themselves on recess.

And Just When You Thought a Practice Direction Was a "Direction"

Huitt v. Huitt, 2021 CarswellAlta 1506 (C.A.) — Slatter, O'Ferrall and Streck JJ.A.

This short, but important, case from the Alberta Court of Appeal serves as a good reminder that "Practice Notes", "Notices to the Profession", and "Practice Directions" are not actually legislated or law.

In Alberta, Practice Note 7 addresses the possible interventions available in family law cases where the court must make a decision about children and where the family is engulfed in conflict. Interventions are conducted by parenting experts who are generally psychologists or clinical social workers. The interventions can be evaluative or therapeutic. The purpose of the intervention is to have the expert report to the court and to assist the court in identifying family-specific challenges. However, the expert cannot offer an opinion or recommendation regarding parenting time, parental responsibilities, decision making, or relocation. The expert can generally only describe what they observe and what they view is happening with the family dynamic.

In contrast, Practice Note 8 deals with what most of us think of as (or what used to be known as) custody/access assessments.

In *Huitt*, in June 2020, following a Practice Note 7 intervention, an order was made giving primary care of one of the children to the Respondent/father. The Appellant/mother was to have parenting time every second weekend and every other Wednesday.

In November 2020, the mother applied for a police enforcement clause and for the child to be eventually returned to her care. The father cross-applied for an order requiring supervised access.

The matter came before a chambers judge in morning chambers (i.e. a regular motions list). The judge (who happened to be Associate Chief Justice Rooke) varied the parenting arrangements on an interim basis. He ordered a Practice Note 8 assessment of the parenting arrangements that would serve the long-term best interests of the children. He also ordered that, effective June 1, the mother's parenting time would be reduced to one overnight visit per month pending completion of the Practice Note 8 assessment.

The sole ground of appeal was that Justice Rooke had erred by making a material change to the parenting arrangements in morning chambers. The mother referred to Practice Note 2:

Restrictions on Morning Family Law Chambers

9. Applications for a change of custody or substantial changes to a parenting arrangement will not be heard in Morning Family Law Chambers; rather, these applications must go to Special Chambers.

The mother argued that the Order under appeal improperly made such "substantial changes."

In dismissing the mother's appeal the Court of Appeal "recognized the general desirability of this provision of the Practice Note" and agreed that, unless there is some urgency or other satisfactory reason, significant changes in parenting should not be made in morning chambers: *G. (H.) v. G. (R.)*, 2017 CarswellAlta 439 (C.A.) at paras. 8-9; *M. (L.D.) v. T. (W.F.)*, 2017 CarswellAlta 558 (C.A.) at para. 7.

However, the Court of Appeal then went on to note that while Practice Notes should generally be followed, they do *not* have the full force of law as do the *Rules of Court*, which are legislated. Such Practice Notes have been described as "informational statement[s] published by the Chief Justice for the guidance and assistance of the registry staff, the legal profession and the public": *R. v. Sharpe*, 1999 CarswellBC 2504 (C.A.).

While not "law", Practice Notes (or Notices to the Profession, etc.) provide guidance to litigants and the Bar as to what they can expect of each other and, more importantly, what the court expects of them, and what they can expect of the court. And if the court routinely undermines the efficacy of a Practice Direction, counsel and the litigants will be tempted to do the same: behaviour tolerated is behaviour encouraged. Procedural uncertainty does not assist in resolving disputes, and indeed can divert attention from the substantive issues.

However, paragraph 9 of Practice Note 2 is not jurisdictional. "While it signals that substantive changes to parenting should not generally be made in morning chambers, it does not limit the mandate of a chambers judge to make such changes in that forum in appropriate circumstances." And whether a proposed change is "substantial" or not, and whether the chambers judge should depart from the general guidance in Practice Note 2, are matters that are within the discretion of that judge.

Here, Justice Rooke, in chambers, was satisfied that the change he made was appropriate. After hearing submissions and reviewing the evidence, he was satisfied that a Practice Note 8 assessment was required. His specific concern was that he did not want any emotional harm to come to the child, and he decided to change parenting on an interim basis pending the receipt of that report. Whether he had sufficient resources before him to enable him to make that assessment of the best interests of the children was within his discretion.

Here, any "irregularity" in the procedure followed did not result in an order that was so unreasonable that appellate intervention was justified — and the appeal was dismissed.

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