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

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COVID-19 Update

There are now more than 40 reported decisions about what issues are "urgent" enough to warrant being heard while the courts are largely closed as a result of COVID-19. Many of these decisions have already been discussed in this *Newsletter* and the *Epstein Cole COVID-19 Case Chart* that is now available on *Westlaw*. However, we want to briefly draw your attention to Justice Jarvis' summary in *Balbontin v. Luwawa*, 2020 CarswellOnt 4383 (S.C.J.), as to how our courts expect parents to act during these very unusual and difficult times:

> [11] All levels of government in Canada, national, provincial and local have issued public health notices dealing with preventing infection which include guidelines for physical distancing and, where appropriate, self-isolating. *Good parents will be expected to comply with the guidelines and to reasonably and transparently demonstrate to the other parent, regardless of their personal interests or the position taken in their parenting dispute, that they are guideline-compliant.* [emphasis in original]

We could not agree more.

We also want to make sure that you are aware of Justice Meyer's caution in *Wang v. 2426483 Ontario Limited*, 2020 CarswellOnt 4540 (S.C.J.): determining whether a matter is urgent is not a "legal determination" or "a new front for parties to battle." Rather, it is part of the court's administrative function, and once the court has decided to schedule a matter for a hearing, "there is no basis for further submissions to be delivered on the issue of urgency":

> [11] **The *Notice to the Profession* provides guidelines for those who nevertheless need to access the courts while they are not in full operation**. People needed to be told the kinds of matters that could be accommodated, the types of materials that they should file, and the email addresses to contact to reach court personnel. **This is all important information for the purposes of explaining to the public and the legal profession the processes put in place to maintain operations by the extraordinary efforts of the Superior Court of Justice**.
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> [12] **However, none of this affects the court's jurisdiction or the applicable rules of law**. All court proceedings continue although only a very few are being scheduled for hearing at this time. **Scheduling is an administrative function of the court**. Normally, in the civil division in Toronto, hearings are scheduled by administrators over the telephone or by email and by judges in Civil Practice Court. **Many factors go into scheduling that are not the subject of discussion with or**

> **among the litigants**. The availability of judges for the type of hearing proposed, the availability of courtrooms, of staff, and numerous other administrative inputs may be brought to bear.
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> [13] Counsel may be invited to make submissions on the timing of a proposed hearing including whether there is a degree of urgency. Or not.
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> [14] **But it is not a legal determination. There is no need or call for detailed submissions. There is no need for submissions on the merits of the proposed proceeding before and certainly not after the scheduling determination has been made**.
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> [15] The court has very limited access to staff with full computer capabilities at present. **Much back and forth about urgency, the merits, and parsing of the terms of the *Notice of Profession* are literally clogging up the Motion Coordinator's email. This is not required. In the main it is not helpful. And it must stop**.
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> [16] **The court has jurisdiction to schedule and hear a proceeding that is brought before it**. If a matter appears to be one that should be scheduled, a case conference is frequently convened. In that way, the presiding judge can quickly contact the parties and determine an appropriate schedule for the exchange of materials and hearing, if any.
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> [17] **Submissions on the merits and emails arguing back and forth among counsel about urgency should not be sent to the court unless invited. Once a civil proceeding is booked in Toronto under the *Notice to the Profession*, there is no basis for further submissions to be delivered on the issue of urgency**. Nor is the issue before the motion judge. Parties are always free to seek adjournments and appropriate scheduling terms before a judge presiding at a hearing. But they do not challenge the scheduling of the hearing itself. **The court's administrative process is not part of the *lis* or the dispute between the parties**.
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> [18] **It is not the intention of the *Notice to the Profession* that hearings will become bogged down by arguments over the applicability of its terms. It is not a new front for parties to battle**. Once a hearing is scheduled by the triage judge(s) the *Notice to the Profession* is spent and the presiding judge will deal with the parties in the manner she or he determines is appropriate. [emphasis added]

While Justice Myers made these statements in the context of a civil case, in our view they should equally apply in the family law context. We must all do our part to ensure that our already scarce judicial and court resources are not wasted by having to process and review voluminous materials about whether a matter is urgent enough to be scheduled right now.

And now for some cases that have absolutely nothing do to with Covid-19 . . .

Letting the "Custody Genie" out of the "Procedural Bottle"

Richardson v. Richardson, 2019 CarswellOnt 20744 (C.A.) - Rouleau, Huscroft and Nordheimer JJ.A.

Disclosure: Epstein Cole LLP represented the respondent father on the appeal, and is representing him as the respondent in the Application for Leave to Appeal to the Supreme Court of Canada that the mother filed with the Supreme Court last week.

Most times, courts are pleased to accept and endorse settlements - especially settlements on the verge of, or in the middle of, trial. But issues with respect to the best interests of children are different. Given the *parens patriae* jurisdiction of the Court, a court need not just "accept" a settlement. And sometimes they don't.

Litigation about the best interests of children has always been somewhat "special." For example, where the best interests of children are concerned, the trial judge can generally intervene as much as necessary to clarify facts, confirm expert testimony and make sure appreciation of the evidence is correct: *Gordon v. Gordon* (1980), 23 R.F.L. (2d) 266 (Ont. C.A.); *Metis Child, Family & Community Services v. M. (A.J.)* (2008), 50 R.F.L. (6th) 233 (Man. C.A.); and *Children's Aid Society of Waterloo (Regional Municipality) v. C. (R.M.)*, 2009 CarswellOnt 7411 (Ont. C.A.). It is part of the court's inherent jurisdiction in custody matters to act on its own motion rather than remain "mute" where the best interests of the children are at stake: *Greenough v.*

Greenough (2003), 46 R.F.L. (5th) 414 (Ont. S.C.J.). This, of course, is different from other litigation where the trial judge will generally intervene as little as possible.

Although it may happen infrequently, it is clear that courts have the authority to review settlements and to reject them if they are not in the best interests of the children: *Martin v. Martin*, 1981 CarswellBC 773 (C.A.), at para. 7; *G. (C.T.) v. G. (R.R.)*, 2016 CarswellSask 778 (Sask. Q.B.), at para. 11; *Harper v. Harper*, 1991 CarswellOnt 1001 (Ont. Gen. Div.), at p. 553; and *Laliberte v. Jones* (2016), 89 R.F.L. (7th) 468 (Sask. Q.B.). In fact, courts can even prevent litigants from withdrawing or discontinuing claims that touch upon the best interests of a child. For example, in *Laliberte v. Jones*, *supra*, the Court would not allow a party to withdraw a custody application once the jurisdiction of the Court had been invoked.

Similarly, in making a custody/access/parenting Order, the court is not limited to the positions put forward by the parties. In *Fox v. Schwinghammer*, 1999 CarswellSask 746 (Sask. Q.B.), for example, as one party sought sole custody and the other sought joint custody, one of the parties argued that the Court was restricted to these two choices when rendering judgment. The Court disagreed, noting that s. 16 of the *Divorce Act* required that, in making a custody/access order, the only consideration was the best interests of the children. Again, the law is clear: once the issue of custody is a matter to be decided by the court, the court is not restricted by the positions enunciated by one or other of the parties.

Notwithstanding this special treatment, rarely do counsel consider that the court *rejecting* a settlement is a real possibility. But that is ultimately what happened in *Richardson*.

In 2016, the wife asked the court's permission to move with the children from the Niagara region to Ottawa. The children were 12 and 6 years old, and the court appointed assessor determined that the children should remain in the Niagara region. The parties initially accepted the recommendations and, in 2016, they entered into a consent Order that the children would remain in the Niagara region, and that the parties would share time with the children equally. Both parties maintained residences in the Niagara region. The mother also had a home in Ottawa, where she lived with her new spouse.

In July 2017, the mother was appointed as a Justice of the Peace in the Ottawa region. She sold her home in the Niagara region, moved to Ottawa, and brought a motion to change the consent Order on the basis that it would be in the children's best interests to reside primarily with her in Ottawa. The trial began on April 1, 2019, before Justice Ramsay.

On the second day of trial, after the wife had presented her evidence, the parties told the presiding judge that they were attempting to negotiate a settlement. On April 3, 2019, the parties presented the judge with Minutes of Settlement. The father consented to the children moving to Ottawa, but there were a number of conditions, including granting the father final decision-making authority over the children.

The trial judge reviewed the proposed settlement but refused to accept it. Justice Ramsay told the parties that he was not "prepared to sign off on it" but also noted that he could not "really say why." He directed that the trial continue, and no one objected. Ultimately, the judge ordered that the children remain in the Niagara region with the father and ordered costs against the mother.

The mother appealed.

The Majority of the Court of Appeal determined that judges have the authority and, in fact, the ***duty*** to review such settlements and to reject them if they are not in the best interests of children. However, this authority must be exercised with caution - mere disagreement with the terms of a settlement does not afford the court the authority to intervene. A court must consider whether a settlement is in the child's best interests, taking into account not only the settlement terms, but also the other potential benefits to a child that might come from compromise or settlement of the parties' dispute (as opposed to continued litigation).

The Majority concluded that when a judge rejects a settlement, the reasons for rejecting the settlement should be provided. Further, a judge should, if possible, take steps to facilitate the settlement. It may be that the judge can provide comments as to their specific concerns, and then send the parties away to speak or arrange a Settlement Conference with another judge. Without

explaining the basis upon which the parties' settlement was rejected, explained the Majority, the parties have no way of knowing what, if anything, they could do to address the court's concern.

While the Majority noted that Justice Ramsay's reasons for rejecting the settlement were extremely limited, this was an exceptional case. The settlement was reached mid-trial. As a result, the reasons for rejecting the settlement needed to be brief so as to avoid any possible appearance that the judge had a bias in favour of one party. In a case where a settlement is negotiated mid-trial, it may be sufficient that the judge is not prepared to find the settlement to be in the child's best interests until hearing all of the evidence. In this case, the findings of the trial judge were made after a full hearing on the merits, and the reasons made clear that there were logical reasons for rejecting the settlement:

> [17] The trial judge found that the [father] was essentially credible but expressed concerns about the mother's credibility and motivations. He considered it unreasonable of her to think that the children could share residence between parents who lived so far apart, and found that she had made demands the [father] could not possibly meet. The trial judge described the [mother's] attempt to justify some of her actions as "baffling" and stated that her "strong desire to win seems to have clouded her judgment".
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> [18] The trial judge detailed several incidents that concerned him. He was particularly concerned with the [mother's] decision to ask the police to carry out a welfare check when the children were with the [father] and her involvement of the Children's Aid Society without having any legitimate basis for doing so.
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> [19] The most important finding made by the trial judge concerned the daughter and her expressed wish to move to Ottawa. The trial judge found that this wish arose primarily out of the parental conflict rather than from independent considerations. He found, further, that her real wish was to end the conflict between her parents, and that she understood - correctly in the trial judge's view - that the mother was the source of the conflict. . . .
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> [20] . . . [The trial judge] found that the respondent had established a change in circumstances: the [mother's] move had made equal sharing impractical; the children had undergone too many tiring trips; and they had missed too much school. The trial judge described the [father] as "essentially under siege", which had weakened his ability to fulfil the needs of the children.
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> [21] The trial judge conducted a fresh inquiry into the best interests of the children, concluding that their principal residence in the Niagara region should not change. The children had lived in the Niagara region since birth; they were physically and emotionally close to their paternal relatives, who also reside in the region; they were well established at school and with friends; and they were doing well academically. The trial judge found that school had become the daughter's refuge from family conflict and that it would be a bad time to uproot her.
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> [22] In summary, the trial judge concluded that a move to Ottawa was not in the best interests of the children, but that a change to the access schedule was. He adopted more or less the [father's] draft proposal. The children would remain in the Niagara region. Their primary residence would be with the [father]. However, the trial judge made several amendments to the [father's] draft proposal, namely in the provision for time sharing so as to reduce travel. This had the effect of reducing the [mother's] access to the children.

The mother also argued that the trial judge erred by continuing to hear the trial after reviewing the Minutes of Settlement. Rule 17(24) of the *Family Law Rules* precludes a judge who has heard a Settlement Conference from hearing the trial of the same matter. In this case, however, the trial judge had not, in fact, heard a Settlement Conference. Rather, he had been provided with Minutes and then rejected them. The Majority noted that, as a result, Rule 17(24) did not apply. Further, neither side made any kind of claim of bias or objected to the trial judge continuing the trial. Both sides were content to let the matter continue after the Minutes were rejected. Neither side requested more details as to why the Minutes were rejected.

On appeal, the Mother also advanced the very difficult argument of "ineffective assistance of counsel" due to her trial lawyer's failure to raise an objection. The test for ineffective assistance of counsel is twofold:

1. That the alleged incompetent representation caused a miscarriage of justice and the complainant was prejudiced as a result; and

2. That the counsel's actions were unreasonable in the circumstances as they existed at the time.

However, as the mother did not provide any evidence about the advice she received or the instructions provided to counsel, she could not make out either branch of the test.

Regardless of what the trial judge may have learned from reading the proposed Minutes, he was *required* to reach a decision following the trial as to the best interests of the children. The Majority was satisfied that he had done so. It also noted that if anyone's position at trial was undermined, *it was the father's*. The father's position was that the children should not move - but, after reading the Minutes, the trial judge then knew that he would be willing to allow the move if certain conditions were present.

Finally, the Majority dismissed the mother's claim that there was a reasonable apprehension of bias on the part of the trial judge. The mother made this claim based on historic interactions she had with the judge prior to their being appointed to the bench. This was not claimed at the time of the trial, and the Majority determined that it was far too late in the day for the mother to raise it on appeal. Having been content to continue with the trial, the mother could not now reverse that decision because the result was not one she liked.

Justice Nordheimer wrote a *very* strong dissent that emphasized the importance of settlements. If the trial judge was going to reject the Minutes, he should have provided guidance about why he had done so. And upon such rejection, the trial judge should have recused himself from the matter. He was now aware of confidential information about the parties' settlement positions. The trial judge was "irretrievably compromised" as a result of this knowledge.

While these are fair points, as noted above, if anyone was compromised here, it was the father, as upon reading the Minutes, his settlement position was known.

Justice Nordheimer also thought that the majority's interpretation of Rule 17(24) was too narrow. While this was not a Settlement Conference, the intention of the *Family Law Rules* is to allow parties to discuss settlement opportunities with judges who would not be the same judges to rule on the matter. Otherwise, parties cannot have confidence that the judge has not pre-judged the matter. Even if the judge sets aside or ignores the information provided, it may have the appearance of impropriety. The court must be impartial and objective - but must also appear objective and impartial to the parties before it. This was irretrievably lost when the trial judge read the Minutes.

Again, while this is a fair point, evidence at trials is regularly excluded and ignored. Courts regularly hear and then "disabuse" themselves of relevant and important evidence that is ultimately ruled inadmissible. If a trial judge can hear and then "ignore" a confession in a criminal case - surely a trial judge can ignore the terms of proposed Minutes of Settlement.

Justice Nordheimer would have allowed the appeal and given effect to the Minutes of Settlement.

While reasonable people can debate whether or not Justice Ramsay should have rejected the Minutes in this case or recused himself after rejecting them, one thing is not up for debate. Once parties invoke the custody jurisdiction of the court, they may lose the ability to end the court's involvement.

We can do no better than to quote the colourful language of Justice Danyliuk in *Laliberte v. Jones* (2016), 89 R.F.L. (7th) 468 (Sask. Q.B.):

> [15] It is the duty of both of these parents to facilitate Ethan's growth and development. It is their duty to put aside their personal agendas and interests, their own selfishness, and to do what is in Ethan's best interests. **It is counsel's duty to sedulously foster these attitudes in their respective clients**. And, often, it is the court's sad duty to intervene when parents fail to act as they should, so as to try to bring order to the chaos. [emphasis added]

. . . . .

> [17] First, I note this is a family law matter. It is not a criminal trial, nor a commercial dispute. **This is an action involving a child's interests. The court is not obligated to sit idly by and act only as a referee**. In family law matters this court frequently exercises its inherent or *parens patriae* jurisdiction to attempt to do real justice between the parties and for the children, and to ensure that the interests of children (who cannot speak for themselves in these proceedings) are protected. Family law requires a somewhat different perspective than what is required for other legal disputes, not only for adjudicators but for counsel and the litigants as well.

. . . . .

> [35] . . . it is my view that **having released the custody genie from the procedural bottle, the petitioner cannot unilaterally seek to shove it back inside** . . . [emphasis added]

We will be pitching our new movie, "The Custody Genie" to Disney Studios next week. It's about a parent that finds a magic lamp during a morning court recess. The lamp is rubbed and . . . well . . . never mind . . .

"Significantly Unfair", "Any Other Factor" and *Ejusdem Generis* - When "Any Other Factor" Doesn't Mean "Any Other Factor"

Singh v. Singh, 2020 CarswellBC 122 (B.C. C.A.) - Smith, Garson, and Fisher, JJ.A.

The "new" British Columbia *Family Law Act*, S.B.C. 2011, C.25 came into force in 2013, and represented a paradigm shift in the way property is divided in family law cases. The one thing we could never understand, however, is why the B.C. government opted for the "significantly unfair" standard as the test for departing from the otherwise presumptive property division scheme. One would have thought that, having dealt for decades with basic "unfairness" as the test, and seeing the amount of litigation (including appeals) that was encouraged by such a low and amorphous threshold, the B.C. government might have opted for a higher standard that would be less subject to the vagaries of judicial opinion and more likely to avoid trials and appeal on property issues - something like "unconscionable" for example.

"Unconscionable" is more than just "unfair, inequitable or unreasonable" or "unfair, harsh or unjust"; it is "simply ludicrous". And, in Ontario, the Court of Appeal has strived to not dilute the standard of unconscionability to mean anything less: *Ward v. Ward* (2012), 26 R.F.L. (7th) 358 (Ont. C.A.). The high bar of "unconscionability" is in keeping with the underlying policy of Part I of the Ontario *Family Law Act* which is to limit judicial discretion and which favours "finality, predictability and certainty".

In *Singh*, the parties were married for 37 years. They owned various property in B.C., the U.S., and India, and the trial mostly dealt with these assets.

Justice Masuhara, the trial judge, did not have *anything* positive to say about the Husband or his evidence. His Honour found the Husband's evidence was wholly untruthful, and that the Husband had lied in affidavits, breached court orders, committed forgery, misrepresented his financial situation, "doctored" a document to mislead the Court, and petitioned a company jointly-owned with the Wife into bankruptcy for a fraudulent purpose.

Relying on the fraudulent bankruptcy and material non-disclosure, Justice Masuhara determined that an equal division would be "significantly unfair", and awarded the Wife an extra $250,000 pursuant to s. 95 of the *Family Law Act*.

Section 95 of the B.C. *Family Law Act* states:

> 95(1) The Supreme Court **may order an unequal division of family property or family debt, or both, if it would be significantly unfair to**
>
> (a) equally divide family property or family debt, or both, or

(b) divide family property as required under Part 6 [Pension Division].

95(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

(a) the duration of the relationship between the spouses;

(b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];

(c) a spouse's contribution to the career or career potential of the other spouse;

(d) whether family debt was incurred in the normal course of the relationship between the spouses;

(e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

(g) the fact that a spouse, other than a spouse acting in good faith,

(i) substantially reduced the value of family property, or

(ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) **any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness**.

95(3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met. [emphasis added]

On appeal, the Husband argued that the trial judge erred in law in his consideration of the factors that he relied on to order an unequal division under s. 95. The Husband acknowledged that the judge based his award on s. 95(2)(i) ["any other factor"], but argued that the trial judge relied on impermissible considerations/factors to ground his award.

Before turning to the manner in which Justice Masuhara applied s. 95 to the facts as he found them, the Court of Appeal reviewed the jurisprudence about the scope of s. 95, the meaning of "significant unfairness," and the interpretation of s. 95(2)(i).

In *Jaszczewska v. Kostanski* (2016), 84 R.F.L. (7th) 316 (B.C. C.A.), the Court of Appeal extensively analyzed s. 95, and noted that the legislature sought to increase certainty, fairness, and predictability in property division matters with the *Family Law Act* by reducing the discretion of the courts to depart from equal division. Whereas the *Family Relations Act* (now repealed) only required "unfairness", the *Family Law Act* required "significant unfairness."

Previously, in *Remmem v. Remmem*, 2014 CarswellBC 2447 (B.C. S.C.) at para. 44 (the first decision in B.C. to consider the definition of ""significantly unfair") Justice Butler defined "significant" as "extensive or important enough to merit attention" and something that is "weighty, meaningful or compelling", concluding that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)."

Building on these definitions, in *Singh*, the Court of Appeal suggested that it would, in fact, not be wise to attempt to define the meaning of "significant unfairness", but found that reapportionment under s. 95 requires "something objectively unjust, unreasonable or unfair in some important or substantial sense" (para. 42).

Justice Garson, for the Court of Appeal, then specifically considered the interpretation of s. 95(2)(i), and whether the factors the trial judge relied on properly fell within its scope. She noted that s. 95(2)(i) is a general "catchall" provision that allows consideration of "any other factor . . . that may lead to significant unfairness." Bringing her best Latin to bear, her Honour then referred to the interpretive rule of *ejusdem generis* ("of the same kind" or the "Limited Class Rule") as an interpretive aid to determine the meaning of a general term that is preceded by a list of specific items. In *National Bank of Greece (Canada) c. Katsikonouris*, 1990 CarswellQue 118 (S.C.C.), La Forest J. explained at 1040:

> . . . Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it.

Ultimately, Justice Garson found that all of the listed consideration in s. 95(2) related to a limited class, namely, the "economic characteristics of a spousal relationship." Therefore, any "other factors" considered by the Court must also be related to the economic characteristics of a spousal relationship. This was not a problem for Justice Garson, and she easily found that the economic characteristics of a spousal relationship would clearly encompass the existence of undisclosed assets and a fraudulent bankruptcy. Consequently, the Court of Appeal found no error in Justice Masuhara's interpretation and application of s. 95(2), or the award of $250,000 by way of unequal division.

As a result, the lesson in *Singh* is that "any other factor" cannot just be "any other factor." It must be a factor relating to the economic characteristics of a spousal relationship.

And thus ends the latest chapter on the interpretation of "significant unfairness." It is ironic (dare we say unconscionable?) that a provision meant to enhance certainty and predictability is itself still subject to interpretation.

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