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— Franks & Zalev - This Week in Family Law

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Contents

Intervene with the Vaccine?

A.P. v. L.K., 2020 CarswellOnt 7026 (S.C.J.) - Akbarali J.

As discussed in the March 9, 2020 edition of *TWFL*, *A.P. v. L.K.* involved an appeal and was from the decision of an arbitrator, in which the arbitrator declined to order the vaccination of the parties' two children. The appellant (the "husband") wanted the children to be vaccinated; the respondent (the "wife") did not.

The Medical Officer of Health for the City of Toronto ("MOH") brought a motion to intervene in the appeal, and as Intervenor Applications are not all that common in family law, we thought it would be an interesting decision to discuss.

The MOH is the top public health official in the City of Toronto. She is responsible for developing and managing public health programs and services in Toronto, including the immunization programs and services that are mandated by the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7. She is also responsible for the administration and enforcement of the *Immunization of School Pupils Act*, R.S.O. 1990, c. I.1, and for directing the vaccination of staff and children at child care centres in Toronto pursuant to the *Child Care and Early Years Act 2014*, S.O. 2014, c. 11, Sched. 1. She is also responsible for encouraging, receiving, and investigating reports of adverse events following immunization.

The MOH described her interest in the underlying appeal as aligning with the public interest in promoting and maintaining the health of the community. The affidavit in support of the intervention motion noted that the MOH's interest in this appeal is informed, in part, through the threat to public health caused by the proliferation of misinformation surrounding the utility, efficacy, and safety of vaccinations. Misinformation about vaccines has contributed to "vaccine hesitancy," which the MOH and others, including the World Health Organization, have identified as a threat to public health by putting vulnerable individuals at risk from vaccine-preventable diseases.

The first question was whether the motion could be heard in writing. Justice Akbarali, without much trouble, concluded that the motion could easily and fairly be heard in writing. Given the COVID-19 crisis, there was certainly no need to allocate very limited court resources to a type of motion that is quite often heard in writing in any event.

On the substantive issue, as is often the case, one party (here the husband) consented to the proposed intervention. The mother opposed it.

The first question was whether the Court had jurisdiction to grant the MOH leave to intervene. There is no rule in the Ontario *Family Law Rules* respecting interventions. However, Rule 1(7) allows the court to refer to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for matters not covered in the *Family Law Rules*.

Rule 13.02 of the *Rules of Civil Procedure* covers interventions:

> Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

The mother argued that the *Family Law Rules* were intended to be a "complete code" where possible, governing the conduct of family law proceedings. Indeed, in *Gray v. Gray* (2017), 98 R.F.L. (7th) 109 (Ont. C.A.), the Court of Appeal suggested that the *Family Law Rules* embody a philosophy peculiar to litigation involving a family, and that instances where it is appropriate to have regard to the *Rules of Civil Procedure* will be rare. Therefore, argued the wife, the absence of a Rule about intervenors should be presumed to be intentional and not accidental. As a family law matter - especially a matter decided in arbitration - is a private, self-contained process, appeals from that process are not the appropriate forum in which to debate public policy. In fact, in *Tarlo v. Boyer* (2010), 93 R.F.L. (6th) 427 (Ont. S.C.J.), the Court specifically found that sometimes the omission of a specific Rule in the *Family Law Rules* is *deliberate*.

Justice Akbarali found the absence of provisions addressing interventions in family law appeals to be a clear gap or omission in the *Family Law Rules* such that the Court was justified in looking to the *Rules of Civil Procedure*, through the lens of Rule 1(7). Clearly, reasoned Justice Akbarali - correctly in our view - by enacting Rule 1(7), the legislature understood there would be times when it would be appropriate to consider the *Rules of Civil Procedure* when dealing with a family law matter governed by the *Family Law Rules*.

Notably, two decisions of the Ontario Court of Justice (as opposed to the Superior Court of Justice) conflict on the matter. In *A. (J.) v. B. (J.)*, 2010 CarswellOnt 11013 (C.J.) the Ontario Court of Justice found it had jurisdiction to grant leave to intervene relying on Rules 1(7) and 13(2). But in *Halton Children's Aid Society v. J.T.*, a judge of the same court found that, as a statutory court, a judge of the Ontario Court of Justice did not have the necessary inherent jurisdiction to appoint interveners. In Justice O'Connell's view, only the Superior Court of Justice (including the Divisional Court and the Family Court), and the Ontario Court of Appeal, have the power to appoint an intervener. However, as a judge of the Superior Court of Justice, Justice Akbarali did not have to cast the deciding vote. For what it's worth, we think the Ontario Court of Justice has the statutory authority to order an intervention. To say otherwise is to say that the Ontario Court of Justice can never resort to Rule 1(7) to deal with a matter not adequately covered in the Rules.

Justice Akbarali also took note of the broad (but not unlimited) inherent jurisdiction of a Superior Court of Record to govern its own processes, including all "powers which are necessary to enable it to act effectively within [its] jurisdiction": *Romeo v. Ford Motor Co.*, 2017 CarswellOnt 17377 (Ont. S.C.J.) at para. 13.

While it is trite that most family law matters deal with private, personal matters that are of interest to the parties only, there will undoubtedly be cases that, because of the issues involved, can have broader impact so as to justify an intervener. This was clearly one of those cases.

Finally, noted Justice Akbarali, an appeal from an arbitration proceeding may raise a matter of public interest. Once parties leave the arbitral process behind by availing themselves of rights of appeal, they can no longer take advantage of the privacy of arbitration, because court proceedings are public. And decisions by courts on appeal can have broader societal impact given their binding nature. While this is absolutely accurate, it is also a problem - one that will be the subject of future comment in this Newsletter.

Taking all of this into consideration, her Honour concluded that she had the jurisdiction to allow the intervention if the test to do so was satisfied. We believe she is right.

That brings us to the test for granting leave to intervene.

Under Rule 13.02 of the *Rules of Civil Procedure*, in considering a motion to intervene, the court must consider:

> a. The nature of the case;
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> b. The issues that arise in the case; and
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> c. The likelihood that the proposed intervener will be able to make a useful contribution to the resolution of the appeal without injustice to the immediate parties.

See, for example, *Jones v. Tsige*, 2011 CarswellOnt 13217 (C.A. [In Chambers]), at para. 22, *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, 1990 CarswellOnt 393 (C.A.).

a. The Nature of the Case

As noted at the outset, the underlying proceeding was an appeal between former spouses arising from a private dispute, determined through a private arbitration. A request to intervene in such proceedings should attract greater scrutiny than would be applied to a request to intervene made in the context of public litigation.

In *Jones v. Tsige*, the Ontario Court of Appeal noted that "the issues that arise in cases involving private litigation fall along a continuum" - some will impact only the immediate parties, while others will have broader application. "The more onerous threshold may be softened somewhat where issues of public policy arise": *Childs v. Desormeaux*, 2003 CarswellOnt 3696 (C.A. [In Chambers]).

b. Issues Raised

The MOH argued that the appeal raised issues beyond the private interests of the immediate parties, and that she sought to intervene only on the broader issues engaging public health and policy. Generally:

> (i) The general utility, efficacy, and safety of vaccines is arguably a cornerstone of provincial public health policy, and is meant to promote the health of school-attending children and the community at large by immunizing against certain preventable diseases. She argued that she had an interest in any attack on the efficacy and safety of vaccines.
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> (ii) The arbitrator's acceptance of the wife's expert evidence and the gatekeeping role that the court and other adjudicators play in vetting purported experts. She argued that she had a particular concern about unreliable evidence that could affect the health of the community being admitted as expert evidence. A decision to not order vaccinations based on inaccurate or unreliable expert evidence lends credibility to misinformation that she believed was feeding into vaccine hesitancy, a current threat to public health.
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> (iii) The use and reliance on public records, specifically documents created by governments and their health agencies to inform health practitioners and the general public about immunization, especially where a party is self-represented and questions of public health are in issue.
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> (iv) The MOH argued that the appeal should address when judicial notice can and ought to be taken by courts and other adjudicators with respect to facts related to immunization in Ontario, including the existence of a public policy at all levels of government recommending vaccination.
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> (v) The reasons in the current appeal would instruct future adjudicators on the approach to be taken in cases where decisions related to vaccinations are at issue.

The wife disagreed that the safety and efficacy of vaccines were at issue in the appeal. She argued that the appeal was simply about the best interests of the specific children before the arbitrator (and now the court).

Despite the wife's clever argument, Justice Akbarali counted at least five issues of public importance arising on the appeal.

c. Will the MOH be able to make a useful contribution to the resolution of the appeal without injustice to the immediate parties?

This consideration required an inquiry into two factors: the likelihood that the MOH would contribute to the resolution of the appeal, and whether the MOH's involvement would cause any injustice to the immediate parties.

In considering whether a proposed intervener may make a useful and *distinct* contribution to a proceeding, Justice Akbarali considered the following general principles:

> [52] . . . a. The proposed intervener must have a real, substantial and identifiable interest in the subject matter and a distinct perspective to be articulated that is different from that of the parties: *Craft et. al. v. City of Toronto et. al.*, 2019 ONSC 1151, 302 A.C.W.S. (3d) 499, at para. 63;
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> b. The likelihood of intervention is a function of many variables including, but not only, the experience and expertise of the proposed intervener: *Jones*, at para. 25;
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> c. The proposed intervener must offer something more than the repetition of a party's argument, though some overlap may be permitted: *Craft*, at para. 62, *Halton*, at para. 45.
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> d. It is desirable to have all relevant possibilities brought to the court's attention, including submissions on the impact of its judgment. This is true even where the intervener may bring only a slightly different perspective to be considered: *Craft*, at para. 64.
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> e. The fact that the position of a proposed intervener is generally aligned with the position of one of the parties is not a reason to deny it leave if the proposed intervener can make a useful contribution to the analysis of the issues before the court: *Scaduto v. Cucu*, 2017 ONCA 224, 227 A.C.W.S. (3d) 283 (Ont. C.A.), at para. 11.

It did not seem difficult for her Honour to find that the MOH had a real, substantial, and identifiable interest in the issues raised in this appeal, given her public mandate. She also had specialized knowledge, expertise, and perspective on issues involving vaccinations and public health. Furthermore, the MOH's position did not duplicate the position of either party. As stated by her Honour: "The appellant's perspective is that of a father who wants his children to become vaccinated. The MOH offers a different perspective, that is, a public health perspective." Indeed, all the arguments posited by the MOH were informed by her unique perspective.

With respect to any possible prejudice, the MOH was prepared to accept the record and to respect the court-imposed timetable. Therefore, the intervention would entail no delay and not much (if any) additional expense. If the limited costs of responding to different arguments raised by an intervener (on an accepted record) amounted to prejudice preventing an intervention, no intervener would ever be granted leave.

The wife also suggested that the intervention would not be in the best interests of the children on account of the further publicity and media attention it would cause. She did not want the children thrust into the middle of a highly publicized debate. But the children were already in the midst of a highly publicized debate about vaccines - so much so that a publication ban had issued ((2019), 29 R.F.L. (8th) 205 (Ont. S.C.J.)). It was, therefore, mere speculation that the intervention of the MOH would add to the public interest in it. The public interest in the case existed well before the MOH expressed any intention to seek leave to intervene.

As a result, Justice Akbarali granted leave to the MOH to intervene on the appeal:

> [71] The MOH has a particular expertise and a distinct perspective that is different from that of the parties. Even applying heightened scrutiny to her request for leave to intervene in this private litigation, I conclude that she is likely to make a

> useful and distinct contribution to the determination of the issues of public importance raised in this appeal. I find that granting her leave to intervene will not prejudice either of the parties.

Interesting issue. Great summary of the test for intervention. Well-written decision. A great read.

Hear What We Say About Hearsay

Nova Scotia (Community Services) v. F.C., 2019 CarswellNS 968 (S.C.), - Haley J.

Back in 2003, Professor Rollie Thompson wrote an important paper entitled, "Are There Any Rules Of Evidence In Family Law?" It, along with its companion piece, "The Cheshire Cat, or Just His Smile? Evidence Law in Child Protection", are both available on Westlaw at 21 C.F.L.Q. 245 and 21 C.F.L.Q. 319. They are definitely worth reading if you have not already done so - and they are worth re-reading if you have - as is Professor Thompson's more recent paper, "The Ten Evidence 'Rules' That Every Family Law Lawyer Needs to Know", which is also available on Westlaw at 35 C.F.L.Q. 285.

In *Nova Scotia (Community Services) v. F.C.*, Justice Haley, who was a Crown Attorney before he was appointed to the Bench, answered Professor Thompson's question of whether there are any rules of evidence in family law with a resounding "yes".

In *F.C.*, the Minister of Community Services (the "Minister"), asked the Court to find that there were reasonable and probable grounds that two teenage children were in need of protective services for a number of reasons, including that the father had allegedly sexually assaulted the parties' 15-year-old daughter, K.C.

The issue for Justice Haley to decide was whether K.C.'s out-of-court statements to the police could be admitted into evidence at trial without K.C. having to give evidence in person and be subjected to cross-examination.

In *R. v. Baldree*, 2013 CarswellOnt 8032 (S.C.C.), the Supreme Court of Canada explained that, "[t]he defining features of hearsay are: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant[.]" Hearsay is "presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's assertion. Apart from the inability of the trier of fact to assess the declarant's demeanour in making the assertion, courts and commentators have identified four specific concerns. They relate to the declarant's perception, memory, narration, and sincerity."

Although there are a number of narrow (mostly historic) exceptions to the rule against hearsay, this case turned on the much broader "principled approach" to hearsay first established by the Supreme Court of Canada in *R. v. Khan*, 1990 CarswellOnt 108 (S.C.C.), and that has been refined in a number of subsequent criminal cases, including *R. v. Smith*, 1992 CarswellOnt 103 (S.C.C.); *R. v. B. (K.G.)*, 1993 CarswellOnt 76 (S.C.C.); *R. v. U. (F.J.)*, 1995 CarswellOnt 555 (S.C.C.); *R. v. Khelawon*, 2006 CarswellOnt 7825 (S.C.C.); *R. v. Blackman*, 2008 CarswellOnt 3722 (S.C.C.); *R. v. Baldree*, 2013 CarswellOnt 8032 (S.C.C.); and *R. v. Bradshaw*, 2017 CarswellBC 1743 (S.C.C.).

The "principled approach" requires the judge hearing the *voir dire* to determine whether the evidence is necessary and reliable. As Justice Haley explained in his decision:

> [19] . . . **The "necessity" requirement is satisfied where it is reasonably necessary to present the hearsay evidence in order to obtain the Declarant's version of events. "Reliability" refers to "threshold reliability" which is for the trial judge to determine.** The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement, "ultimate reliability" which is the weight or value that the trier of fact gives to the admitted evidence. [emphasis added]
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> . . . . .
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> [24] At the voir dire of the proceeding, the Court must assess necessity and threshold reliability. **"Reasonable necessity" requires that reasonable efforts be made to obtain the direct evidence of the witness.** The requirement of **necessity**

> **protects the integrity of the trial process.** Without a requirement of necessity, the introduction of out-of-court statements could replace the calling of witnesses, which would deprive the opposing party of the opportunity to test the evidence through cross-examination, even where effective cross-examination is entirely possible (Paciocco and Stuesser, page 131).
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> [25] As a general proposition, **where a witness is physically available, and there is no evidence that he or she would suffer trauma in testifying, then the witness should be called.** It is not enough that a witness is unwilling to testify. **Fear or disinclination without more, do not constitute necessity** (Paciocco and Stuesser, page 132).
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> . . . . .
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> [27] **In considering "reliability" a distinction is made between "threshold" and "ultimate reliability".** This distinction reflects the important difference between admission and reliance. **Threshold reliability is for the trial judge who acts as a gate keeper and whose function is limited to determining whether the particular hearsay statement has sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement.**
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> . . . . .
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> [30] In [*R. v. Khelawon*, 2006 SCC 57], the Court observed that **the reliability requirement will generally be met if: (1) the statement is inherently trustworthy; and, (2) the accuracy can be adequately tested by the trial judge and assess its true worth.** [emphasis added]

In addition to these common law rules about hearsay, s. 96(3)(b) of Nova Scotia's *Children and Family Services Act* provides that the court should consider the best interests test when deciding whether to admit a child's out-of-court statement for the truth of its contents:

> 96(3) Upon consent of the parties or upon application by a party, the court may, having regard to the best interest of the child and the reliability of the statements of the child make such order concerning the receipt of the child's evidence as the court feels appropriate and just, including . . .
>
> (b) the admission into evidence of out of court statements made by the child.

Although the Minister did not call expert evidence to show that K.C. would be traumatized if she had to give evidence in court, Justice Haley accepted that her out-of-court statements were reasonably necessary because "the rule has been relaxed and broadened with respect to necessity being replaced with best interests considerations pursuant to s. 96(3)", and she had been having significant behavioural issues that led him to conclude that it would not be in her best interests to have to testify against her father.

But that was not the end of the matter, as Justice Haley also had to decide whether K.C.'s out-of-court statement met the test for (threshold) reliability. And there were some *very* serious problems with how the police had obtained K.C.'s out-of-court statements, including that:

- K.C. was "continuously pressed by the interviewers to make a disclosure."
- Even though K.C. was clearly "not comfortable in the interview setting" and "expressed being ill; having a migraine; and, being tired", the police continued interviewing her for almost four hours.
- It appeared that K.C. "believed that she had no choice other than to remain in the room against her wishes."
- The police did not attempt to have K.C. confirm that a letter that they had her sign was true before she signed it.
- There was evidence to indicate that K.C. might have a motive to fabricate allegations against her father.

• The police had not adequately ensured that K.C. understood the difference between the truth and a lie, and never asked her to promise to tell the truth during the interview.

As a result of these significant problems, Justice Haley found that the statements could not be admitted at trial:

> [104] In consideration of the above, I find that the Minister has failed to prove on a balance of probabilities that the statements meet the threshold reliability test. **Threshold reliability is established when the hearsay is sufficiently reliable to the overcome the dangers arising from the difficulty of testing it. This has not been achieved in this instance. Hearsay dangers still persist.** I am mindful of the distinction with ultimate reliability which the Court need not consider at this time. The issue before the Court at this time is one of admissibility only. The statements are, therefore, ruled to be inadmissible.
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> [105] K.C. is a young, bright, articulate and well-spoken young woman. She has made a serious allegation against her father. **That allegation, nonetheless, cannot be presented to the trier of fact in statement form. There are insufficient safeguards to establish its inherent trustworthiness. The statements do not exhibit sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement.** I am exercising my discretion under s. 96(3) not to admit the police statements. I find this decision is appropriate and just in the circumstances. [emphasis added]

Of course, it cannot be known if K.C.'s out-of-court statements were accurate or not. Elicited differently from the police, the statement may have been determined to be sufficiently reliable to as to be considered at the ultimate reliability (or "weight") stage. Therefore, it is important to remember that the manner in which an out-of-court statement is elicited - the "circumstantial guarantees of trustworthiness" is as important as the statement itself. If the circumstances of the statement do *not* create the concerns that are usually associated with hearsay dangers, the evidence is generally to be admitted (subject to considerations at the ultimate reliability stage) even though cross-examination is not possible: *R. v. Smith*, 1992 CarswellOnt 997 (S.C.C.) and *Moore v. Moore*, 2013 CarswellNS 416 (S.C.). The "circumstantial guarantees of trustworthiness" do not remotely require that reliability be established with absolute certainty. But some efforts are required, and the efforts here appeared to have been lacking.

The Credibility of a Paper Record?

SMF v. BWF (2020), 38 R.F.L. (8th) 17 (Alta. C.A.) - Schutz, Greckol, and Khullar, JJ.A.

It is common to hear counsel argue that a motion judge cannot make a factual determination on the basis of conflicting affidavits. While that is generally an accurate statement, in *SMF v. BWF* the Alberta Court of Appeal reminds us that every rule admits of exceptions.

The Appellant, SMF, appealed a family order of a special chambers judge that determined residency of the children and child support. The special chambers hearing resulted from an initial order, to which neither party objected, specifically directing that the proceedings be heard in a special chambers hearing. This would prove to be important.

In comprehensive reasons, the chambers judge properly outlined the relevant background, summarized the positions of the parties, set out the correct law, and applied the relevant law to the factual findings. But an issue arose as to findings of credibility the chambers judge made on the basis of only a paper record.

The underlying dispute centred around which child lived with which parent over the last several years, and what support ought to have been paid.

The parties offered conflicting evidence as to where each of the children had lived for certain periods. However, notwithstanding that conflicting evidence, the chambers judge made factual determinations as to where each of the children had lived.

The Appellant raised three main grounds of appeal, submitting that the chambers judge erred by:

a) preferring the Respondent's evidence over the Appellant's evidence in the face of conflicting affidavit evidence;

b) considering impermissible hearsay evidence of third parties and evidence relating to the Child Tax Benefit; and

c) determining that no child support would be payable to the Appellant unless there was a change in the Respondent's income, or some other material change in circumstances?(this ground is not important for the purposes of our discussion here).

As would be expected, the Court of Appeal cited *Hickey v. Hickey*, 1999 CarswellMan 254 (S.C.C.) for the fact that the standard of review on questions of parenting and child support is deferential:

> When family law legislation gives judges the power to decide support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges . . . Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.

The Court of Appeal then noted that the standard of review for findings of fact and for inferences drawn from the facts is the same even when the judge heard no oral evidence: *Housen v. Nikolaisen*, 2002 CarswellSask 178 (S.C.C.) at paras. 19 and 24-25. Where evidence exists to support factual findings and inferences, an appellate court cannot generally find a palpable and overriding error. It is not the role of an appellate court to second-guess the weight assigned to various items of evidence. As noted by the Supreme Court of Canada in *Housen* (at para. 24): "The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review."

The Court of Appeal did not agree that the chambers judge was precluded from deciding the parties' dispute simply because there was some conflicting evidence. The Court emphasized that not all evidence is accorded equal weight, and that the weight to be given to evidence is within the purview of the chambers judge.

At this point, the Court of Appeal noted that neither party objected to the initial order that directed these proceedings to be heard in a special chambers hearing, and knew that the matter would be decided solely on the basis of affidavit evidence and a paper record. The Court then continued:

> While a judge is never relieved of the obligation to fairly decide all issues in accordance with the law, in our view, any concerns about the suitability of process ought to be expressly raised. In the absence of timely objection, this Court is entitled to presume that counsel, on behalf of their respective clients, assessed the evidence and tacitly agreed that a hearing based on affidavit evidence, and counsels' submissions, would be fair and the most expeditious and inexpensive way to bring closure to their clients' dispute.
>
> Further, we do not agree that a viva voce hearing was necessary to ensure a fair process in this matter. While the parties' evidence was not perfect, it was good enough. Indeed, in submissions before the chambers judge, counsel for the appellant appeared to acknowledge this, by stating "this dispute on the facts is resolved by a number of key facts that aren't in dispute".

The chambers judge gave detailed reasons as to why he preferred the evidence of one party over the other regarding different time periods. As a result, the Court of Appeal determined that there was sufficient direct evidence from the parties to permit the chambers judge to make the findings of fact, and draw the inferences necessary to fairly resolve the parties' dispute and make the orders.

It would be easy to be critical of the Court of Appeal for not adhering to the general principle that a court should not make factual or credibility findings based on conflicting affidavits. See for example: *Dumas v. Marchand* (2006), 28 R.F.L. (6th) 1 (Alta. C.A.); *Ierullo v. Ierullo* (2006), 32 R.F.L. (6th) 246 (Ont. C.A.); *Dayton v. Blondeau*, 2006 CarswellSask 632 (C.A.); *P. (D.) v. B. (R.)* (2007), 44 R.F.L. (6th) 9 (P.E.I. C.A.); *Kent v. Kent*, 2009 CarswellNfld 227 (U.F.C.); *W. (B.L.) v. W. (W.W.)*, 2011 CarswellAlta 976 (Alta. C.A.); *R. (N.E.) v. M. (J.D.)* (2011), 12 R.F.L. (7th) 70 (N.B. C.A.); *Campbell v. Hine* (2014), 53 R.F.L. (7th) 62 (Sask. C.A.); and *Kollinger v. Kollinger* (1995), 14 R.F.L. (4th) 363 (Man. C.A.). In some cases, the affidavits are so

conflicted that a hearing on a paper record is simply impossible: *Schnarr v. Schnarr* (2006), 22 R.F.L. (6th) 52 (Ont. C.A.); *Sloan v. Sloan* (2009), 71 R.F.L. (6th) 425 (Ont. S.C.J.); *Persaud v. Garcia-Persaud* (2009), 81 R.F.L. (6th) 1 (Ont. C.A.) - even when counsel agree otherwise: *R. (N.E.) v. M. (J.D.)* (2011), 12 R.F.L. (7th) 70 (N.B. C.A.).

However, it is also important to remember that, sometimes, conflict is more apparent than real. Sometimes, as in this case, conflicting assertions can be resolved upon a consideration of the whole of the evidence: *C. (P.A.) v. C. (W.D.)*, 2012 CarswellAlta 186 (C.A.).

Or, to quote the British Columbia Court of Appeal in *Placer Development Ltd. v. Skyline Explorations Ltd.*, 1985 CarswellBC 336 (C.A.) (although not a family case, it has been quoted in numerous Canadian family law cases):

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

See also *Davis v. Davis*, 2016 CarswellSask 577 (Q.B.) and *Tarry v. Rincker* (2013), 35 R.F.L. (7th) 263 (Sask. C.A.).

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